

**United States  
Environmental Protection  
Agency**

**EPA Region 3  
Philadelphia, PA**



**Volume II**



Congregation of Divine Providence  
Office of Peace and Justice  
1000 St. Anne Drive  
Melbourne, KY 41059  
August 14, 2003

REC'D AUG 18 2003

John Forren  
U.S. EPA (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

I oppose mountaintop removal and valley fills and any change in the buffer zone rule. I am very concerned and, yes, angry, that the federal government ignored its own studies when it proposed weakening, rather than strengthening, protections for people and for the area in which they live. It seems that the ordinary citizens of this country no longer count!

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Big business -- in this case -- the coal companies have priority. Is this what our country is coming to?

Whereas, 724 miles of streams across the Central Appalachian region were buried by valley fills between 1985 and 2001 and another 1200 miles of streams have already been impacted by valley fills;

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Whereas, selenium, a highly toxic metalloid, was found only in coalfield streams below valley fills killing aquatic life forms there;

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Whereas, a total of 2,200 square miles of Appalachian forests will be eliminated by 2012 by large-scale mining operations;

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Whereas without additional environment restrictions, mountaintop removal mining will destroy an additional 600 square miles of land and 1000 miles of streams in the next decade;

How can this shameful report be ignored?

Three alternatives are included in the EIS report. I reject all of these. None of these will protect our water or our communities.

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For justice,

*Catherine M. Holtkamp*  
Catherine M. Holtkamp  
Coordinator - Office of Peace and Justice



**TCWN**  
TENNESSEE CLEAN WATER NETWORK

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January 5, 2004

Mr. John Forren  
U.S. EPA (3EA30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

The Tennessee Clean Water Network (TCWN) appreciates the opportunity to submit the following comments on the draft programmatic Environmental Impact Statement (EIS) on mountaintop removal coal mining. TCWN is a statewide, nonprofit organization dedicated solely to protecting, restoring, and enhancing Tennessee's waters and the communities that depend on them.

TCWN is opposed to any changes that would weaken the laws and regulations that protect our rivers and streams from the effects of mountaintop mining and valley fills. As a result, we are opposed to each of the alternatives evaluated in the May 29, 2003 draft EIS.

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Mountaintop removal mining is a highly destructive practice where entire mountaintops are blasted away to reach thin seams of coal underneath, and millions of tons of rock and soil are dumped into adjacent valleys. The practice destroys forests, leaves a barren landscape, and buries the headwaters of rivers, which are essential to maintaining healthy, dynamic river systems. Headwater streams provide crucial linkages between upstream watersheds and tributaries and downstream rivers and lakes. The natural processes that occur in intact headwater streams affect the quantity and quality of water and the timing of water availability in rivers, lakes, and groundwater. These processes, which are integral to functioning ecosystems, are also crucial to human well-being. The upper reaches of stream networks are important for purifying water, storing water, recharging groundwater, and reducing the intensity and frequency of flooding.

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The draft EIS contains indisputable evidence of the devastating and irreversible environmental harm caused by mountaintop mining. The administration's own studies have detailed the devastation, including:

- over 1200 miles of streams have been damaged or destroyed by mountaintop removal
- direct impacts to streams would be greatly lessened by reducing the size of the valley fills where mining wastes are dumped on top of streams
- the total of past, present and estimated future forest losses is 1.4 million acres

*Protecting, Restoring, and Enhancing Tennessee's Waters and the Communities that Depend on Them*

- even if hardwood forests can be reestablished in mined areas, which is unproven and unlikely, there will be a drastically different ecosystem from pre-mining forest conditions for generations, if not thousands of years
  - without new limits on mountaintop removal, an additional 350 square miles of mountains, streams, and forests will be flattened and destroyed by mountaintop removal mining.
- Other agency studies also show that mountaintop mining contributes to flooding disasters in mountain communities.

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Unfortunately, each of the alternatives in the draft EIS ignores the findings of these studies and the very purpose of the EIS – to find ways to minimize, to the maximum extent practical, the environmental consequences of mountaintop mining. The draft EIS does not examine a single alternative that would reduce these impacts. The draft EIS proposes no restrictions on the size of valley fills that bury streams, no limits on the number of acres of forest that can be destroyed, no protections for imperiled wildlife, and no safeguards for the communities of people that depend on the region's natural resources for themselves and future generations.

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The "preferred alternative" would clearly increase the damage from mountaintop mining by eliminating the Surface Mining Control and Reclamation Act's buffer zone rule that prohibits mining activities that disturb any area within 100 feet of larger streams, eliminating the current limit on using nationwide permits to approve valley fills in West Virginia that are larger than 250 acres, and giving the Office of Surface Mining a significant new role in Clean Water Act permitting for mountaintop mining (a role it does not have under current law).

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Our environmental laws require, and the citizens of the region deserve, a full evaluation of ways to reduce the unacceptable impacts of mountaintop mining. TCWN urges EPA to abandon the "preferred alternative" and to reevaluate a full range of options that will minimize the enormous environmental and economic damage caused by mountaintop mining and valley fills.

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Thank you for your consideration.

Sincerely,

Renée Victoria Hoyos  
Executive Director

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REC'D JAN 07 2004

December 28, 2003

John Forren  
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Dear Mr. Forren:

I want to thank you and the members of the EIS steering committee for the opportunity to comment on the Draft Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia, and for extending the review period until January 6, 2004. My comments are based on more than a decade of ethnographic and historical research which I have conducted with communities in the southern West Virginia coalfields. What I have seen of mountaintop removal and valley fill mining in the course of this research fills me with consternation on many fronts, but in this letter I want to focus on critical cultural concerns raised by the draft EIS, since that is where my professional expertise lies. To contextualize my comments on particular points in the draft EIS, I want to begin by clarifying what is at stake culturally in the maintenance of stream buffer zones.

#### *Stream Buffer Zones as Cultural Commons*

Protected by U.S. law as the property of the citizens of the United States, the headwaters in the mountains form a part of the commons that unites us as citizens. The

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*Protecting, Restoring, and Enhancing Tennessee's Waters and the Communities that Depend on Them*

1963-2003 Celebrating Forty Years of Folklore and Folklife at the  
UNIVERSITY of PENNSYLVANIA



commons of air and water circulate through all of us, and through food so do the commons of soil and biodiversity. It is a matter of public health to safeguard these public goods. But just as critically, these material goods anchor and unite us collectively as citizens with a stake in these goods, not just as consumers of coal. At the national level, these streams ground and strengthen us as a polity. At the local level, the headwaters are integral to the historical and cultural landscapes that nurture community life. As a democratic polity it is in our best interest to sustain the resources that strengthen local presence in the national public sphere.

To appreciate just one of the ways in which headwaters uniquely form local cultural resources, consider the names for these headwaters. Nearly every wrinkle in the mountains bears a local name, which serves as a reminder of genealogical, historical, and ecological processes: Walnut Hollow, Mill Hollow, Schoolhouse Hollow, Sugar Camp Hollow, Seng Branch, Bear Hollow, Dickens Hollow, and so forth. These names, which are household words in local conversations, situate people as citizens of the mountains who rely on the headwaters for a variety of services, which I'll consider below. Fostering shared identity, these public goods, the headwaters, are cultural resources, and they are also civic resources. They represent generations of human investment in making the mountains a place to live and work, and this investment needs to be weighed against the investment that coal companies have made, without benefit of public debate, in giant machinery that is ill-fitted to mountain ecologies.

### *Defining Cultural Resources*

In this regard, I would argue for expanding the definition of cultural resources in your glossary. Cultural resources are those which nurture collective identity, serving as touchstones to a shared history and a continually emerging sense of shared destiny. Cultural resources provide communities with a sense of continuity despite ongoing ruptures (including natural death, economic crisis, war, ecological disaster), and they provide communities with the visibility they need to represent themselves in larger political bodies. In this vein, mountains serve as cultural resources for citizens living in the mountains, since mountains form the medium through which communities develop a shared identity (hence the state's motto: "Mountaineers are always free."). Another word for such a public good is "commons." Participants in the commons share understandings of the importance of the public goods of streams and biodiversity and their relationship to the plateau topography of Central Appalachia. Land and mineral companies defend their right to destroy these goods over the rights of their neighbors to enjoy the economic and cultural benefits provided by these goods. These land and mineral companies have placed themselves and their coal beyond the reach of the public commons for the purpose of controlling the enclosure they have created around coal. Because the enclosure of coal and the commons of the mountains occupy the same physical space, and because both are arguably of value to the public good, safeguarding the stream buffer zone is a critical cultural and political issue: the stream buffer zone anchors the citizens of the United States within the enclosures of coal. The stream buffer zone is the commons that the

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citizens of the United States are being asked to allow industry to privatize in the draft EIS.

*The Gulf between Description of Resources and Alternatives in the Draft EIS*

Although in the descriptive portions of the EIS you begin to address what is culturally and ecologically at stake with this buffer zone, you do not provide an alternative that safeguards the headwaters. You describe the mixed mesophytic forest and the cove hardwoods as world class resources, you register the extraordinary diversity of invertebrates and amphibians, and you explicitly express amazement at the diversity of birds. But while you begin to address what is culturally significant, you have not put it together in a way that clarifies the true cost of the loss of these public goods in relation to the very short term gains of mountaintop mining. You do make it clear that the forest and its species thrive on the cove and valley topography that mountaintop mining will destroy and replace with landform complexes. You make it clear that this loss is irreversible and that it will have profound cultural impacts. But you have not specified in the alternatives a future that involves sustaining mountains and culture together. You have not articulated a process for any kind of alternative development, as such alternatives are prescribed in the National Environmental Policy Act (NEPA).

*Cultural Implications of the Language of the Draft EIS*

Language, a cultural resource, is a powerful tool for shaping reality. When, for example, you speak in the EIS of "the mountaintop mining region," you appear to favor industry by conceding the region to them. With that in mind, I want to question other uses of language in the Draft EIS, which ultimately support the goals of the coal industry over other options which are supposed to be under consideration. The glossary exemplifies

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my point. Most of the terms in the glossary support the impression that Central Appalachia is the mountaintop mining region, not, for instance, the ginseng region or the mixed mesophytic region, which would be equally valid designations. In its favor, the glossary does give us a sense of the components of the "land form complexes" that the coal industry proposes to install on the Central Appalachian plateaus. These landform complexes will be created through processes like "backfilling," "boxcutting," "cast blasting," and "wing dumping." Using "dozers," "draglines," "front-end loaders," "hydraulic excavators," "hydroseeders," "panscrapers," and "dump equipment" the coal industry will create "blanket drains," "core drains" (aka "flumes"), "center ditches," "benches," "fill structures," "commercial woodland," "groin ditches," "perimeter ditches," "sedimentation ponds," "support areas" and "development areas." In the process they will have to deal with "bulking factors" "fugitive dust," "probable hydrologic consequences." And so forth.

What the glossary does not do, and should do, is provide us with a full sense of the alternative which motivates so much resistance to mountaintop removal. There are a few terms that offer us a glimpse of the commons beyond coal – such as "aquifer," "biological diversity," "cultural landscape," "headwaters," and "waters of the United States." But the inclusion of landscape features crucial to mountain life, and vulnerable to mountaintop mining, would help to disclose more fully the staggering cultural and social costs of this form of mining. Such terms might include landscape features at risk (i.e. "knob," "gap," "crossing," "swale," "cove," "drain," "bear wallow," "side hollow," "main hollow," "rich bench," "newground," "poplar flats," "check dam") as well as ecological concepts expressed in the vocabulary of the local commons ("den tree," "bee

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tree," "berry patch," "ramp patch"). The uses of these terms in everyday life in the mountains may not be familiar to many readers, and would therefore be important to include. More terms and some definitions can be found on the USGS website, as well as on the *Tending the Commons* website:

<http://memory.loc.gov/ammem/cmnshml/map.html>. by clicking on such features as they have been mapped at the headwaters of the Big Coal River.

#### ***The Ideas of Development, Productivity, and Tradition in the Draft EIS***

In addition to these landscape terms, there are three other terms that appear throughout the draft EIS that I would like to address: "development," "productivity," and "non-traditional forest products." Since you do not define "development" in the glossary, I would like to suggest a definition drawn from Jane Jacobs' *The Nature of Economies*: development means "differentiation emerging from generality." Having differentiated to the point that, as you observe, a number of headwaters boast endemic species of invertebrates, the central Appalachian plateaus would seem to be one of the most highly developed regions in the planet's temperate zone. In this view, mountaintop removal represents a profound form of undevelopment. In contrast to the standardization imposed by mountaintop removal mining, the level of development achieved through evolutionary differentiation takes specific forms of cultural expression as well.

As the writers of the EIS express amazement at the diversity of avifauna, I must confess that as an ethnographer, I find the varieties of human expression in the mountains to be equally amazing and worthy of respect. The folklorist Lynwood Montell observed that nearly every hollow in Eastern Kentucky has developed its own varieties of beans, which my work in West Virginia corroborates. I am amazed at the variety of

forms taken by homemade implements for cultivating the soil. In fact, I have yet to encounter two ginseng hoes that look exactly alike. The differentiation in these forms is a tiny outcropping of thousands of years of human interaction with this landscape, interactions that have yielded the knowledge and skills necessary to make the mountains productive of human community life and values. I have not found in the draft EIS any use of the word "productivity" which recognizes this accomplishment. If you do not recognize this kind of productivity, how can you provide for it?

Finally, I am startled to see activities that have been practiced in the mountains for thousands of years associated in the draft EIS with *non-traditional forest products*. "Non-timber forest products," a term with which I am familiar, usefully draws our attention to the renewable productivity of forests, and to values not measurable in board feet. Making trees productive of honey, syrup, bark, fruit, and nuts, and making the mixed mesophytic understory productive is a human project that has developed through transmission of traditional knowledge over many generations. Unless I am missing something, terming these practices "non-traditional" seems to trivialize them. What then, are *traditional* forest products, and how have you arrived at this particular distinction?

#### ***Cultural Services Provided by Mountains and Headwaters***

Last spring, in an effort to devise methods for cultural planning in mountain communities faced with mountaintop removal and valley fills, the Center for Folklore and Ethnography conducted a workshop with community organizers in Pipestem, West Virginia. In this workshop, entitled "Getting Out of the Overburden and Onto the Map: Cultural Assessment in the Mountaintop Removal Permitting Process" (March 2003), we asked those assembled to identify the cultural amenities provided by the mountains which

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they would like to see considered in the draft Environmental Impact Statement. The question prompted comments quite similar to the comments that your team gathered at its public meetings. While these comments are amply registered in the descriptive portions of the draft EIS, I don't find them to be adequately addressed in the alternatives. In an effort to translate these comments into a useful planning tool, we tested them against a graphic of the Mixed Mesophytic Seasonal Round, which can be viewed online at:

<http://memory.loc.gov/ammem/cmnhtml/season1.html>

<http://memory.loc.gov/ammem/cmnhtml/season2.html>

This graphic, which shows the annual round of hunting, gathering, gardening, fishing, recreation, community events, and employment opportunities, represents a key cultural asset that is grounded in specific sites and species in the mixed mesophytic forest and cultural landscapes of the central Appalachian Plateau. This seasonal round of activities takes people all over the mountains. It is a structure whereby people continually carry the past forward into the future. This structure and its vital cultural practices cannot be protected through conventional means of historic preservation. The seasonal round embodies thousands of years of transmission of human knowledge and skills. What is the effect of mountaintop removal and valley fill mining on this seasonal round of cultural and economic practice? The draft EIS vaguely suggests that the loss of the commons in which this seasonal round is practiced could be ameliorated through the creation of public parks. But how can public parks compensate for the loss of the knowledge and skills that are intimately connected to particular spaces? It appears that you have not done a study of the economic, social, and ecological value of the seasonal round, and of the

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possibility of development centered around these community based practices. Why is that the case?

#### *Wild Ginseng as a Species of Concern*

While all of the resources that support the seasonal round (nut trees, named streams, understory species like ramps, ginseng, goldenseal, landscape features like knobs, gaps, coves, swags, drains, benches, and so forth) are of value, one linchpin of the seasonal round warrants far more attention than you have given it in this report, and that is wild ginseng (*panax quinquefolia*). A 1996 study by Appalachia Science in the Public Interest observed that for wild and virtually wild ginseng the Chinese market alone is 12 billion dollars annually. To provide a basis for comparison, according to the West Virginia Mining and Reclamation Association in Charleston, West Virginia, the coal industry meets a direct annual payroll of around one billion dollars for the state of West Virginia. More than half of the U.S. annual export of wild ginseng comes from the coal-bearing plateaus. The reason for this, as the West Virginia ginseng officer told me in a telephone conversation, are cultural. He said that people in the coalfields grow up digging roots and gathering herbs. Protecting ginseng, then, is another way to protect culture. Wild ginseng is monitored under the terms of the Convention on International Trade in Endangered species because of its extraordinary economic value and its very limited habitat. Have you looked into the question of how much of this habitat will be destroyed by mountaintop removal coal mining? Has the steering committee calculated the dollar value of wild ginseng, a renewable resource, over the hundreds of years it could take to regenerate that habitat? For more information on the wild ginseng region, see [http://www.folkculture.org/pdfs/ffc\\_essay\\_11.pdf](http://www.folkculture.org/pdfs/ffc_essay_11.pdf)

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**Additional References**

Lastly, may I recommend the following items for your bibliography?

Appalachia Science in the Public Interest. 1996. "Ginseng in Appalachia," *ASPI Technical Series 38*. Mt. Vernon, Kentucky: Appalachia-Science in the Public Interest.

Couto, Richard. 1999. *Making Democracy Work Better: Mediating Structures, Social Capital, and the Democratic Prospect*. Chapel Hill: University of North Carolina Press.

(To balance the discussion of the "fatalism" which the draft EIS describes as a cultural attribute. There is, as you know, a long history of community-based resistance, apart from the history of the unions, which you do address. See also Fisher, 1993, and Gaventa, 1980)

Fisher, Stephen. Ed. 1993. *Fighting Back in Appalachia: Traditions of Resistance and Change*. Philadelphia: Temple University Press.

Gaventa, John. 1980. *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*. Urbana: University of Illinois Press.


Hufford, Mary. Ed. 1994. *Conserving Culture: A New Discourse on Heritage*. Urbana: University of Illinois Press. (Re: alternatives to bottom-line economics in conserving cultural, natural, and economic resources)

Jacobs, Jane. 2000. *The Nature of Economies*. New York: Random House.

Salstrom, Paul. 1994. *Appalachia's Path to Dependency: Rethinking a Region's Economic History 1730-1940*. Lexington: University Press of Kentucky. (To complicate the claim made in several places in the draft EIS that coal has driven the region's settlement and development)

Smith, Russell. 1929. *Tree Crops: A Permanent Agriculture*. New York: Harcourt Brace (Re: an alternative kind of forestry, more suited to the biological diversity of the region than the even-aged, monocultural stands comprising the commercial forests of post-mining land-use).

Thank you again for the opportunity to comment, and I hope my comments will be useful to you in preparing the final draft of the EIS.

Sincerely,  
  
 Mary Hufford, Director  
 Center for Folklore and Ethnography  
 University of Pennsylvania  
 Philadelphia, PA 19104

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----- Forwarded by David Rider/R3/USEPA/US on 01/08/2004 11:18 AM -----

Carolyn Johnson  
 <ccc6@mindspring.com>  
 To: R3 Mountaintop@EPA  
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 Subject: commentsdeis.doc  
 01/06/2004 04:06  
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 Please respond to  
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Citizens Coal Council

Working together for clean water, safe homes and a healthy environment  
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January 5, 2004

Mr. John Forten  
 Project Manager  
 U.S. Environmental Protection Agency (3FES30)  
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 Philadelphia, PA 19103  
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 Email: mountaintop.e3@epa.gov

Subject: Comments on the Draft Programmatic EIS on Mountaintop Removal/Valley Fills in Appalachia

Dear Mr. Forten,

I am submitting these comments on behalf of the Citizens Coal Council, a national federation of 45 grassroots groups located in 24 coal-producing states and Native American Nations who work together for environmental justice that protects their communities and resources. The Council has individual members and eight member groups based in Kentucky, Tennessee, Virginia and West Virginia as well as thousands of additional individual members across the country.

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Our members live in the coalfields next to mountaintop removal mines and valley fills. They have handed together to survive the daily onslaughts from these unsafe, outlaw coal operations: blasting, polluted water, floods, destroyed water supplies, landslides, monster coal trucks, unsafe roads, damaged homes and property, disappearing forests, fish and wildlife, monoculture economies, deteriorating public services and sinking property values, and corrupt or spineless public officials. Our members did not volunteer to have their homes and homelands transformed into a national sacrifice zone for cheap energy and private profit and they are fighting back.

#### Good Autopsies Don't Bring Back the Dead or Prevent Future Deaths.

The 5,000-page draft EIS (DEIS) extensively quantifies the irreversible widespread environmental harm already caused by mountaintop removal mining/valley fills and estimates the future harm of these practices to the communities and ecosystems:

- Eliminating 2,200 square miles of forests
- Destroying 1,000 miles of streams and another 600 square miles of land in the next 10 years.
- Adversely impacting 244 vertebrate wildlife species in West Virginia alone.

Overall, the scientific studies are good autopsies that do inform the public and decision-makers of the death and destruction caused by mountaintop removal and valley fill operations. However, the National Environmental Policy Act (NEPA) requires and the courts have long upheld that agencies can't skate by their responsibilities with autopsies that describe harms in an environmental impact statement. The agencies must analyze a range of actions that will prevent and lessen harm.

#### A Sham and a Shame

Not one of the alternatives nor the DEIS as a whole complies with the letter or spirit of NEPA. Citizens can read diligently for days searching for a needle of action in this 5000-page haystack of words but will find nothing. The analyses of the three grossly misnamed "action" alternatives contain not one action to prevent the enormous environmental damage so extensively documented elsewhere in the study. Stripped of the code words and gobbledeygook, these alternatives consist of weakening the existing rules and signaling these mining operations to charge ahead and continue the devastation. The "no action" alternative continues the existing failure of the federal and state agencies to deny permits for damaging operations, to take effective enforcement actions against those mine operators that cause the devastation and to shut down those who persist.

The DEIS at page II.D-8 devotes one paragraph to the alternative to prohibit valley fills and dismisses it, claiming that the Clean Water Act's 404 program is not amenable to being used to prohibit fills. Regardless of any merits of that claim -- and we believe them to be close to zero -- the DEIS authors have failed to produce any examination of how ending fills and mountaintop removal could be achieved under a well-thought out alternative of active enforcement of existing appropriate regulations and the adoption of new or amended policies and regulations that would be necessary to achieve the prohibition. This failure drags with hypocrisy and is further evidence of the heavy hand of Deputy Secretary Steven Giles, former coal industry lobbyist, who assured the coal companies the DEIS would not threaten their destructive practices:

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"But on August 4, 2001--three days after signing his recusal letter--he gave a speech before the West Virginia Coal Association, reassuring members that 'we will fix the federal rules very soon on water and spoil placement.' Two months later, Giles sent a letter to the EOA and other agencies drafting the EIS, complaining that they were not doing enough to safeguard the future of mountaintop removal and instructing them to 'focus on centralizing and streamlining coal mine permitting.' ("Dirty Secrets" by Osha Gray Davidson, September/October 2003 issue of Mother Jones Magazine.)

For the alternatives they did choose, these same authors describe at length proposed changes in agency coordination practices and policies and rolling back a major protective regulation such as SMCRA's buffer zone protection rule. Failure to carefully and professionally analyze this protection alternative -- one that could reasonably result in the most environmental protection for huge swaths of Appalachian forests, streams and the tens of thousands of Appalachian residents who value and use them -- makes the entire DEIS process a sham and a shameful waste of the public's trust and tax dollars.

"Frankly My Dear, I Don't Give a Damn." (Rhett Butler to Scarlet O'Hara in Gone With The Wind)

The authors of the DEIS make much ado about "enhancing" and shuffling "coordination processes" among the OSM, Corps of Engineers and state mining agencies. "Coordination processes" are no substitute for action that prevents environmental destruction. Since its creation in the Surface Mining Control and Reclamation Act of 1977, OSM has had the legal authority and responsibility to enforce the law and prevent extensive environmental damages like those described in the DEIS, but from 1981 onward a long succession of agency directors and Interior Secretaries -- regardless of political party -- did not enforce the law, and the same is true for most state regulatory agencies. The Army Corps of Engineers has long seen its mission as clearing the way for wetlands destruction, straightening rivers, and overseeing boondoggle public works projects and shady contractors (Halliburton's oil gouging in Iraq only being the latest). For the last 15 years, EPA's approach to coal mining issues has been "nobody here but us chickens," and this once-proud agency is now known as the Environmental Polluter's Arm.

These failures cannot be explained away by poor inter-agency coordination, lack of coordination, or confusing rules. Agency leaders have lacked the political will to take enforcement actions, reject permit applications and carry out their respective laws. They don't care enough to serve the public. We members of the public frankly don't give a damn about the number and type of meetings, letters and consultations that agencies hold. We want positive action to prevent this destruction and will not accept any substitute.

#### Recommendations.

We urge the five sponsoring agencies -- Corps of Engineers, EPA, Fish & Wildlife Service, Office of Surface Mining, and West Virginia Department of Environmental Protection -- to issue a new DEIS that:

1. Includes the new Preventive Alternative as the preferred alternative. This new alternative would logically follow from the scientific studies already done for this draft and would lay out a

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comprehensive plan for preventing new mountaintop removal/valley fill operations and stop the existing ones within 5 years or the by the expiration of the current mining permit, whichever date occurs first.

2. Names, describes and analyzes the violations, past and present, of each mountaintop removal/valley fill operation since 1985.

3. Lists, describes and analyzes the permitting and enforcement failures of the Corps, EPA, OSM and WVDEP.

4. Amends the economic impacts analysis and lists the campaign donations from each mining, supply and coal-buying company by name to each state and federal candidate since 1985. (Much of this information is available from the Center for Responsible Politics, and we will be glad to recommend other sources.)

5. Tells the truth and respects the public. Removes code words and euphemisms such as "mountaintop mining" for mountaintop removal, "harmonizing regulations" for weakening and rolling back the rules, "confusion" about the stream buffer zone rule in place of "we don't and won't enforce it."

Sincerely,

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January 6, 2004

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**Re: Comments on the Mountaintop Mining/Valley Fill Draft Environmental Impact Statement**

Dear Mr. Forren:

On behalf of Alpha Natural Resources, LLC (Alpha), I am submitting these comments resulting from the review of the above referenced Draft Programmatic Environmental Impact Statement (MTM/VF EIS) document.

Alpha is a privately held company formed in August 2002 and headquartered in Abingdon, Virginia. In just a little more than a year, Alpha's affiliates have acquired coal mines and processing plants in Virginia from subsidiaries of Pittston Coal Company; coal mines and processing plants in Kentucky, Virginia and West Virginia from El Paso (Coastal); coal mines and processing plants in Colorado, Kentucky, Pennsylvania, and West Virginia from AMCI and its subsidiaries; and recently acquired coal mines and a processing plant in Pennsylvania from Mears Enterprises.

Alpha and its subsidiaries employ about 2,300 people, produce approximately twenty-two million tons of steam and metallurgical coal and will sell approximately six million tons of third party coal annually. Together, Alpha's subsidiaries make up the largest producer of coal in Virginia and the fifth largest in the East.

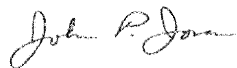
Alpha's subsidiaries are active members of the Virginia Coal Association, the Kentucky Coal Association, the West Virginia Coal Association, and several other similar coal industry-related organizations. We support and concur with the joint coal industry technical comments prepared by a consortium of these professional organizations, which is being provided to EPA.

Alpha, on behalf of its subsidiaries, would like to take this opportunity to go on the record in support of Action Alternative No. 3 and wishes to submit the following comments:

- We strongly feel that the vast majority of surface mining operations should qualify for the Nationwide 21 (NW 21) Permit process, while generally only the very largest operations, with multiple large-volume valley fills and a potential for significant adverse impacts, would require Individual Permits (IP).
- The appropriate SMCRA enhancements should be made to allow for the SMRCA regulatory agency to take the lead role in a joint application type permitting process.
- To help clear up the quagmire that the 404 permit review process has become, all future 404 permit application reviews, whether IP or NW 21, should occur concurrently with the SMCRA permit review.
- Current mitigation requirements should be amended, through a multi-agency effort, to allow credits for reining, reclaiming areas mined prior to 1977 and left in an unreclaimed status (AML), and other innovative reclamation projects that result in wildlife habitat enhancement whether aquatic or terrestrial.
- Due to the current dire status of the surety industry, and the difficulty in obtaining surety bonds, the SMCRA required bonds should be sufficient to cover mitigation activities.
- The Eastern Kentucky Stream Assessment Protocol has never undergone an adequate peer review, nor has it followed the administrative procedure process. The Protocol should be merely a recommended method of stream quality determination, and not a requirement, until such time as it can be professionally reviewed, and the public has had a chance to make comments upon its merit.

Regardless of the final Alternative chosen, adverse impacts to the public, our aquatic and terrestrial resources, as well as to our mining industry should be minimized. Thank you in advance for giving your favorable attention to our concerns.

Respectfully submitted,



John P. Jones

Environmental Compliance Manager

1-13



**A Statement by the Catholic Conference of Kentucky on Mountain Top Removal**

December 10, 2002

Dear Friends in Christ,

We write you on the occasion of your ecumenical gathering for a "Prayer on the Mountain" in Letcher County, Kentucky. Our other obligations prevent us from traveling to the mountains to be with you today, but we send our prayers of support and words of encouragement.

We know from people ministering in Appalachia and media reports about the environmental and human devastation caused by the abusive strip mine practice known as "mountain top removal." This practice can damage the foundations of homes and destroys the wells of people living in nearby communities. It dumps millions of tons of earth and rock into valleys ruining springs and head waters of creeks essential to the animal and plant life for miles downstream. It can destroy graveyards and home places and alters communities revered by generations of families who trace their ties to that land. We understand that McRoberts itself has suffered five devastating floods in 18 months, and many other areas of Appalachia have faced similar destruction.

As we reflect on Sacred Scripture we believe that the care of creation represents a spiritual act. We remember that God finished the work of creation and "found it very good" (Gen. 1:31.) Then God put humanity in the Garden of Eden, a symbol of the whole world, "to cultivate and care for it" (Gen. 2:15.) Creation reflects the beauty of God and humanity becomes a co-gardener with God.

In addition, since the world belongs to all, decisions about the world's use must be determined by a concern for the common good of the whole human family. Pope John Paul II joining his voice with a growing chorus of ethical people throughout the world proclaims the right to a safe environment must eventually be included in an updated U.N. Charter of Human Rights. That your "Prayer on a Mountain" takes place on December 10, International Human Rights Day, symbolically connects the respect for the earth with the protection of our human community.

We pray that society will produce its necessary goods and services without destroying God's gift of creation. Unfortunately, the practice of economics frequently exploits both the land and the workers in a rush for quick profits. Society must reject the false dichotomy of jobs versus the environment and creatively find ways allowing workers to earn their livelihoods while respecting creation. May God shed blessings on you as you pray for the restoration of creation and the uplift of your communities.

Yours in Christ Jesus,

✠ Thomas C. Kelly, O.P., Archbishop of Louisville ✠ John J. McRaith, Bishop of Owensboro

✠ Roger J. Foys, Bishop of Covington ✠ Reverend Robert J. Nieghberding, Lexington Administrator

The Catholic Conference of Kentucky is the public policy agency of the state's four Roman Catholic Dioceses. This statement is also available on the CCK website - [www.cck.org](http://www.cck.org)

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**Kentuckians For The Commonwealth**

P.O. Box 1450 London, Kentucky 40743 606-878-2161

**Facsimile**

January 6, 2003

REC'D JAN 06 21

TO: Mr. John Forren  
U.S. Environmental Protection Agency (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

FR: Kentuckians for the Commonwealth  
Phone (606) 878 2161  
Fax (606) 878 5714

RE: EIS Programmatic Draft Statement

PP: 14 total

Included are some individuals' comments regarding the Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement. Some of these may be copies.

Ms. Colleen Unroe  
211 K.C. East Dr. Apt. 5  
London, KY 40741

Mr. John Forren  
U.S. Environmental Protection Agency (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

REC'D JAN 06 2004

Dear Mr. Forren,

I am a resident of Laurel County, Kentucky, which located in the coalfields. I know people who have been directly affected by this type and other devastating forms of coal mining, and I find it horrendous that the Bush administration plans to continue to let coal companies destroy Appalachia with mining practices that level mountaintops, wipe out forests, bury streams, and destroy communities.

1-9

According to the administration's draft Environmental Impact Statement (EIS) on mountaintop removal coal mining, the environmental effects of mountaintop removal are widespread, devastating, and permanent. Yet the draft EIS proposes no restrictions on the size of valley fills that bury streams, no limits on the number of acres of forest that can be destroyed, no protections for imperiled wildlife, and no safeguards for the communities of people that depend on the region's natural resources for themselves and future generations. This is simply unacceptable.

I disagree with the Bush administration's "preferred alternative" for addressing the enormous problems caused by mountaintop removal coal mining, which weakens existing environmental protections. The draft EIS proposes streamlining the permitting process, allowing mountaintop removal and associated valley fills to continue at an accelerated rate. The draft EIS also suggests doing away with a surface mining rule that makes it illegal for mining activities to disturb areas within 100 feet of streams unless it can be proven that streams will not be harmed. This "preferred alternative" ignores the administration's own studies detailing the devastation caused by mountaintop removal coal mining.

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The Bush administration's "preferred alternative" ignores these and hundreds of other scientific facts contained in the EIS studies. In light of these facts, the Bush administration must consider alternatives that reduce the environmental impacts of mountaintop removal and then implement measures to protect natural resources and communities in Appalachia, such as restrictions on the size of valley fills to reduce the destruction of streams, forests, wildlife and communities. Ultimately, the future of our environment, economy, and communities is at stake. We need policies and regulations that protect our land and our people, while bolstering sustainable economic development and sustainable energy sources.

Sincerely,

Colleen Unroe

Robert M. Hensley, D.V.M.

1025 Creekside Lane Nicholasville, KY 40356

859 271-2920

19 August 2003

Mr. John Forren  
1650 Arch St.  
Philadelphia, PA 19103

Dear Sir:

I am opposed to the concept and practice of disturbing the mountain top topography to more "efficiently" and "economically" gain access to the coal seams thereunder. This approach to mining may be good for the bottom line of the coal companies, but it most certainly is not for the adjacent environment or its inhabitants.;

Compounding this unconscionable technique is the disruption, if not destruction, of contiguous waterways with the overburden or spoil. This practice flies in the face of existing laws which attempt to preserve, if not improve, the water quality in these areas. The proposed changes would reduce the 100 foot buffer zone which attempts to protect existing streams and would exacerbate conditions of many already degraded by mining activity.

In sum, we must not continue the history of abuse of these areas simply for additional profit. It is time that the quality of life for the inhabitants and their environment be given a higher priority than the profit margins of the corporations causing this destruction.

Sincerely,

Robert M. Hensley, D.V.M.

cc:KFIC

416 Logan Street  
Frankfort, KY 40601  
August 23, 2003

John Forren  
U.S. EPA (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

I am writing against the recommendations in the U.S. government's EIS report on mountaintop removal for the mining of coal. The report itself documents the great destructiveness of this practice for water quality and forest ecosystems, but none of the three alternatives that it proposes will reverse this destruction. Instead, they weaken existing regulations, including the important stream buffer zone. The recommendations can only serve the short-term interest of the coal industry: not the immediate and long-term needs of the people of Appalachia for clean water, sustainable jobs, sustainable development and secure homes.

For administrators far removed from the mining, this issue may appear abstract. I live a few blocks from the Kentucky River, which flows brown from erosion from destructive mining practices at its headwaters, while the people of Appalachia see their land literally blasted away beneath them. Appalachia has the potential for becoming a national center for tourism and wilderness recreation, but this possibility is being stolen from us and all future generations.

I urge the E.P.A. to reject the EIS recommendations as a contradiction to the evidence gathered by its own reports.

Sincerely,

*Louise Chawla*  
Louise Chawla

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810 Sunset Road  
Ann Arbor, Michigan 48103  
August 25, 2003

Mr. John Forren, U.S. EPA (3ES30)  
1650 Arch Street  
Philadelphia, Pa 19103

Dear Sir,

I am writing to comment on the unfortunate, vague and inadequate recommendations made for action in response to EIS report regarding mountaintop removal mining and valley fills.

I am a graduate of Berea College and my mother was a Kentuckian. She would not only be shocked and dismayed (as I am also) at the wreckage of her beautiful state but would want to protest the cavalier way in which the current administration is "responding" to an EIS report documenting the extreme damage occurring at the hands of the coal companies in Kentucky.

Your report specifies weak and vague alternatives to correct the continuing irreversible damage being done to mountain streams and terrain. Why? Evidence in the report clearly indicated a need for a more specific and preventive role for our government.

It all boils down to who lives and loves Kentucky most:

Is it the coal companies with their blind need for profits in a state that can do without this kind of destructive coal mining?

Is it President Bush who has already a long track record of assaults against the environment to profit big business?

Is it lawmakers in Frankfort, whose knees are too weak to behave like they should in opposing the continual destruction of their state for political gain?

You answer.

Sincerely yours,

Mary Corsi Kelley  
Mary Corsi Kelley

cc. Jim Bunn's  
MTC & M'Connell

Mr. Eugene Mullins  
Box 2370 Punccheon Rd.  
Kite, KY 41828

Mr. John Forren  
U.S. Environmental Protection Agency (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

I live in Knott County in Eastern Kentucky in the community of Punccheon. CONSOL of Kentucky Inc. as well as other Coal Companies has been mining in Punccheon for more than five years now. The coal trucks running up and down this small county road have destroyed the quality of life in this community.

But it's the valley fills from the strip mines that nearly washed out the more than 20 homes that exist on Punccheon back in June of this year. I have lived on Punccheon for over fifty years and I had never seen the creek flood at the head of Punccheon Branch at the bridge in front of my home-place, not during the floods of 1957 or of 1963. During the thunderstorm back in June of this year CONSOL's valley fill on permit number 860-0390 slipped several hundred feet causing mud and rocks to fill the creek below. CONSOL's valley fills pose a direct threat to the more than 20 homes that exist on Punccheon Road.

Valley fills like this exist all over eastern Kentucky. Time and gravity will cause them all to slip. Coal Companies are not following the law when they build these valley fills. Each fill is suppose to consist of eighty percent durable material. In my mind durable material is large rocks, not dirt and shale. These valley fills are also suppose to be compacted to certain specifications. It is expensive to create a valley fill properly. If the State and Federal Governments aren't going to force Coal Companies to create valley fills properly then the Coal Companies will cut corners to save money and at the same time endanger everyone who lives below these time bombs. Valley fills are routinely larger than they need to be because they are improperly constructed. This is a danger to residents and destroys our streams.

I know first hand the terrible impacts of mountaintop removal and valley fills. I also believe we can build a better future for eastern Kentucky. We can have clean streams and a healthy forest and restore our quality of life. We can create good jobs for our people that don't wreck the environment. And we have to start down a different road now.

Take a stand. Enforce the law. Ban mountaintop removal and valley fills. Stop the coal industry from destroying everything that we value most. Start making choices that will benefit our children and yours.

Sincerely,

Eugene Mullins

Aug 15, 2003

August 18, 2003

Mr. John Forren  
U.S. Environmental Protection Agency (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

I oppose any changes that would weaken existing laws and regulations that protect clean water.

The Draft Environmental Impact Statement on mountaintop removal and valley fills ignores the government's own science and economic studies. The EIS recommends "streamlining" the permit process to make it easier for coal companies to level our mountains, bury our streams, and wreck our homeland.

I oppose all three alternatives outlined in the draft EIS. While this proposal may assist in providing cheap energy to this nation, it is short-sighted. The damage that results from mountaintop removal is permanent.

As the report shows, more than 1,200 miles of headwater streams have already been buried or destroyed. Thousands of acres of forest land has been permanently wiped out.

The American people that live in this area have their lives and property damaged/destroyed because of this mining method.

The negative impacts of mountaintop removal and valley fills are unacceptable and immoral.

I oppose any changes that would weaken existing laws and regulations that protect clean water. I also support aggressive enforcement of the present laws with severed prison terms for those that violate the law.

Sincerely,

Earl R. Wilson  
1113 W. Francis Ave  
Clarksville, IN 47129

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Mr. John Forren  
U.S. Environmental Protection Agency (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

As a resident of Lexington, in eastern Kentucky, I have watched the mountaintop removal controversy with great interest. It's hard to believe the scale of destruction that is going on with our beautiful mountains. I have met with coalfield residents many times, especially after the coal slurry disaster in Martin County, Kentucky, that was caused by mountaintop removal mining.

I have talked with people whose water wells have been destroyed, whose foundations have been cracked, who have had to sue coal companies for dust from preparation plants, whose children go to bed at night with their clothes on when it rains, for fear of flooding.

It seems to me we are destroying the future economy of the region. Clean water will be as important to future generations as oil is today. The water wars are coming, as has been predicted by Fortune and other business magazines. This is why we see multi-national conglomerate corporations like RWE, Vivendi, and Suez swallowing up American water companies like American Water Works of Vorhis, NJ. These big companies know that the potential profits are huge in the future for those with a monopoly on a reliable source of clean water.

We have clean water in abundance here in Appalachia, and it can be our future economic salvation. Or we can stupidly bury our mountain streams underneath mining waste, and contaminate our free-flowing Appalachian streams with blackwater spills and toxic runoff from mountaintop removal sites.

It's hard to believe that the Bush administration, which prides itself on being so industry-friendly, can be so short-sighted as to destroy, permanently, one of our greatest economic and natural resources: clean water. More than 1,200 miles of our headwater streams have been buried or destroyed by valley fills.

But that's only the beginning of the economic stupidity. Mountaintop removal also destroys valuable hardwood forests, and has already had a negative impact on the timber industry in West Virginia. Almost 7 percent of our forests have been - or will soon be - leveled by mountaintop removal. West Virginia Division of Forestry Director Bill Maxey quit his job in protest of mountaintop removal. That's jobs being lost!

Flooding in Appalachian communities is increasingly common and severe. Who pays? FEMA — i.e. the taxpayer! And homeowners insurance goes up every time there is another disaster. The coal companies externalize their costs onto the public.

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01/08/04 11:15 FAX 000 010 0123

It doesn't have to be this way. There are laws on the books to protect clean water, public safety and the environment. It is perfectly clear that mountaintop removal and valley fills are a violation of the federal Clean Water Act and the Surface Mining Control and Reclamation Act. These practices should be banned. The coal industry must not be allowed to destroy our homeland.

The draft Environmental Impact Statement on mountaintop removal and valley fills is a dangerous gift from the Bush administration to the coal industry. Instead of recommending ways to stop the destruction, the EIS proposes ways to make it easier for coal companies to level our mountains, bury our streams, and wreck our homeland. This is shameful and wrong.

I know first hand the terrible impacts of mountaintop removal and valley fills. I also believe we can build a better future for eastern Kentucky. We can have clean streams and a healthy forest and restore our quality of life. We can create good jobs for our people that don't wreck the environment. And we have to start down a different road now.

Take a stand. Enforce the law. Ban mountaintop removal and valley fills. Stop the coal industry from destroying everything that we value most. Start making choices that will benefit our children and yours.

Sincerely,

David S. Cooper  
608 Allen Ct.  
Lexington KY 40505

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01/08/04 11:15 FAX 000 010 0123

Mr. John Forren  
U.S. Environmental Protection Agency (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

I live in Harlan County, Kentucky at the headwaters of the Cumberland River. We have had nearly a hundred years of coal mining in our community. We have very little clean water. We once had plenty.

The draft environmental impact statement on mountaintop removal published recently by the Bush administration is a slap in the face of everyone who needs water to survive. It is a malicious, poisonous, shortsighted, misanthropic, hateful, greedy, anti-democratic document.

I pray that the people who put it before the public will live long enough to see the errors of their ways and correct them. I pray that the people who wrote this document never have to drink the greasy black water that comes out of the spigots of people in the American coalfields. I pray that they never have to pull their sleeping children out of a home flooded as a result of rain on poorly reclaimed strip jobs.

My message to President Bush and all the formulators and enforcers of his self-serving, callous, cynical, dangerous energy policy is this: I support none of the proposed alternatives in your environmental impact statement. Enforce SMCRA the way it was written. Enforce the Clean Water Act the way it was written.

Good people don't have to get sick and die just so this country can have electricity. We can do better. Pursue alternatives.

Elected officials are supposed to look out for the interests of all the people--not just their fraternity brothers, family friends, and corporate cronies. Quit acting like gangsters and start acting like statesmen. Or pursue another line of work.

Robert Gipe  
PO Box 1394  
Harlan KY 40831

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August 15, 2003

Mr. John Forren  
U.S. Environmental Protection Agency (2ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

I am writing to express my outrage and disappointment in the Draft Environmental Impact Statement on mountaintop removal and valley fills. This document is an affront to intelligent people. It ignores the government's own science and economic studies. Instead of finding ways to stop the destruction, the EIS recommends streamlining the permit process to make it easier for coal companies to level our mountains, bury our streams and wreck our homeland.

I oppose all three alternatives outlined in the draft EIS. None of these options will protect our water or shape a better future for Kentucky. Instead of these weak alternatives, the federal government should ban the use of mountaintop removal and valley fills forever. It is time to fully enforce existing laws designed to protect clean water and the environment.

I oppose any changes that would weaken existing laws and regulations that protect clean water. Do not eliminate the stream buffer zone rule (30 CFR 816.57), a regulation that prohibits mining within 100 feet of streams. This rule should be strictly enforced for valley fills and in all other cases. Likewise, do not make it easier for coal companies to seek and obtain permits for valley fills. These proposals are dangerous to the coal industry and should be rejected.

Growing up in eastern Kentucky, I know full well the damage that results from strip mining and mountaintop removal. Thousands of residents have seen good clean water go bad. Floods have devastated homes and families. Habitat is forever destroyed for much of our wild game once mountaintop removal and valley fills occur. Again, please reject these proposals.

Sincerely,

Dr. Roger C. Noe, Professor

John Forren  
U.S. EPA (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

I oppose mountaintop removal and valley fills and any change in the buffer zone rule. I am disappointed and angry that the federal government ignored its own studies when it proposed weakening, rather than strengthening, protection for people and the environment. Scientific studies document the widespread and irreversible damage the coal industry is doing to our state and region. Mountain top removal ignores the public's demand for clean water, healthy environment and safe communities.

Please accept the wisdom of those who live in these areas and the scientific studies that support these correct insights. How many coal company CEO's live in Harlan County, Kentucky?

Thank you for considering the good of the people in the coal areas

Sincerely,

Gayle Brabec  
1707 New Orleans Ct.  
Lexington, KY 40505

Cc: President Bush



Union of Concerned Scientists  
Citizens and Scientists for Environmental Solutions

January 6, 2004

Mr. John Forren  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103

**Re: Draft programmatic Environmental Impact Statement on mountaintop coal mining and associated valley fills in Appalachia**

Mr. Forren –

Thank you for the opportunity to offer comments on behalf of the Union of Concerned Scientists (UCS) on the Draft programmatic Environmental Impact Statement (draft EIS) on mountaintop coal mining and associated valley fills in Appalachia. Established in 1969, UCS is an independent nonprofit alliance of 65,000 committed citizens and leading scientists across the country. We augment rigorous scientific analysis with innovative thinking and committed citizen advocacy to build a cleaner, healthier environment and a safer world. The UCS Clean Energy Program focuses on developing a sustainable energy system—one that is affordable, uses non-depletable resources, and does not degrade natural systems or public health.

While UCS appreciates the considerable interagency effort that went in to developing the draft EIS, we must express our alarm in the Agency's decision to exclude consideration of any alternatives for more strict limits on mountaintop mining and valley fill, and instead largely ignore sound science by supporting a "preferred alternative" that weakens existing environmental protections, and ultimately eases the permitting process for coal mining companies.

There is strong empirical evidence in the over 30 technical studies conducted in association with the draft EIS that indicate the pervasive and permanent impact to the environment, and to the public health and culture of communities near mountaintop mining and valley fill operations. For example, the data show that over one thousand miles of headwater streams have been destroyed or degraded, including 724 miles of streams that have been buried forever under huge piles of waste. The report also states that it is difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites. Current reclamation efforts are simply converting what had been biologically diverse native hardwood forested mountaintops to grassland plateaus. Downstream of mountaintop removal operations, stream chemistry monitoring efforts show significant

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1707 H Street, NW • Suite 600 • Washington, DC 20006-3962 • TEL: 202.223.6133 • FAX: 202.223.6162  
2397 Shattuck Avenue • Suite 203 • Berkeley, CA 94704-1567 • TEL: 510.843.1872 • FAX: 510.843.3785

January 6, 2004  
Page 2

increases in conductivity, hardness, sulfate, and selenium, which is highly toxic to aquatic life at relatively low concentrations.

Despite the considerable evidence of the environmental and social harm caused by mountaintop removal, the draft EIS does not include any meaningful actions for reducing its impact. There is no consideration for restrictions on the size of valley fills, nor are there any limits proposed on the number of acres of forest and other ecosystems that can be destroyed. There is also no consideration of new safeguards for the communities of people that value and depend on the region's ecological heritage.

According to the economic analysis prepared for the draft EIS in 2001 by Hill & Associates, even the most severe restriction on valley fills studied in their report (a 35-acre limit on the size of valley fills) would not cause serious economic harm. The report found that a 35-acre valley fill limit would raise the price of coal by only \$1 per ton and would have virtually no impact on the cost of electricity. A separate EPA draft study from April 2002 concluded that the 35-acre restriction would have very little average annual impact on statewide employment (less than 0.3% of total year 2000 employment) in Kentucky and West Virginia.

Rather than focusing on alternatives that strengthen restrictions on mountaintop removal and valley fill, the Agency's "preferred alternative" is to weaken existing environmental laws, and streamline the permitting process by shifting approval and administrative responsibilities among government agencies. The environmental and economic studies prepared for the draft EIS do not lend sufficient evidence to warrant support for this proposed "preferred alternative" as a means for limiting the impact of mountaintop coal mining.

The preliminary version of the draft EIS considered several alternatives that would limit the size of mountaintop removal valley fills. These alternatives represented more effective strategies for reducing the widespread impacts of mountaintop mining. They also more appropriately reflected the cumulative impact study that analyzed the effects on aquatic and terrestrial ecosystems of several different scenarios for future mountaintop removal mining. Yet, all alternatives for restrictions on valley fills were excluded in the draft EIS finally released. We urge the EPA to include these alternatives in the final EIS.

These alternatives should be considered for their own environmental merits. In addition, we note that the administration has been increasingly advocating the use of advanced coal technologies, in conjunction with carbon sequestration, as a potential carbon-free resource for electricity and hydrogen production. In this context, coal will compete with other carbon-free alternatives, such as the increased use of wind, solar and other renewable energy resources. To the extent the administration hopes to win support from the environmental community and public for advanced coal technologies as a potential climate solution, it is critical that the administration require progress in reducing the upstream environmental impacts of coal mining, to place coal on a more level playing field with renewable alternatives over the life cycle of these resources. Permitting hidden

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January 6, 2004  
Page 3

subsidies for coal by way of allowing increased upstream impacts and external environmental costs can only diminish the likelihood of public support for advanced coal technologies.

We thank you for the opportunity to comment, and respectfully request the EPA to consider the recommendations proposed above.

Respectfully submitted,

//s//

Kevin Knobloch  
President  
Union of Concerned Scientists

----- Forwarded by David Rider/R3/USEPA/US on 01/08/2004 11:39 AM -----

Steve Krichbaum  
<loki4@rica.net> To: R3 Mountaintop@EPA  
cc:  
01/06/2004 05:37 PM Subject: DEIS Comments

Wild Virginia  
P.O. Box 1891  
Charlottesville, VA 22903 phone: 434-971-1553

Mr. John Forren  
U.S. EPA (3EA30)  
1650 Arch St.  
Philadelphia, PA 19103  
mountaintop.r3@epa.gov

Dear Mr. Forren:

Mountaintop removal mining is a highly destructive practice where entire mountaintops are blasted away to reach thin seams of coal underneath, and millions of tons of rock and soil are dumped into adjacent valleys. The practice destroys forests, leaves a barren landscape, and buries the headwater streams, which are essential to maintaining healthy, dynamic river systems.

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This DEIS does not achieve the fundamental purpose of its preparation: \_to minimize, to the maximum extent practicable, the adverse environmental effects . . . by mountaintop mining operations\_ (see 64 FR 5778). By so doing, this document additionally violates the settlement agreement of Bragg v. Robertson. Nor does this DEIS comply with the fundamental purposes of the NEPA (see 42 USC 4321).

4-2

The mountains and streams of the analysis area are vitally important habitat for numerous species and populations of amphibians, reptiles, mammals, birds, mollusks, annelids, arthropods and other invertebrates. Severe direct, indirect, and cumulative harmful impacts to these populations are ignored or discounted in the DEIS.

9-2-2



The examined alternatives do NOT \_enhance environmental protection\_ or minimize the adverse effects from MTM/VF. (ES-4) Instead, the EIS process here has been obviously result-driven and politicized so as to flagrantly facilitate the permitting of more MTM/VF operations (through so-called \_improved efficiency [and] collaboration\_). See \_Preferred Alternative\_. The bureaucratic wheel-greasing on view here ignores clear harms and does not meaningfully protect the public or our environment from the avoidable adverse impacts of MTM/VF. Instead of protecting us and improving the present destructive situation, the preferred so-called

\_improved regulatory process\_ would foreseeably result in even more destruction of streams, valleys, flora, fauna, and human quality of life

in the Central Appalachians.

The range of the alternatives examined in detail is improperly limited. Such constricted consideration does not \_more thoroughly address impacts to our environment\_, nor does it \_better inform the public\_ and \_provide more meaningful participation\_ (ES-10). To claim otherwise (as the ES docs) is clearly unreasonable.

To comply with the NEPA and provide a legal basis for well-informed and well-reasoned decision-making, other alternatives need to be examined in

detail. Our environmental laws require, and the citizens of the region deserve, a full evaluation of ways to reduce the unacceptable impacts of

mountaintop mining. The agency needs to abandon the "preferred alternative" and to reevaluate a full range of options that will minimize the enormous environmental and economic damage caused by mountaintop mining and valley fills.

Alternatives need to be considered in detail that:

Prohibit the use of valley fills.

Label all of the region's streams as \_high value\_.

Set an upper limit on the percentage, number and/or length of streams allowed to be impacted.

Restricting the size of fills to 35 acres, 14 acres (the median size of intermittent streams), or less.

Restricting fills to certain types of streams (e.g., ephemeral).

There is enough \_science\_ to clearly indicate that burying streams under ton of waste and rubble is irreversibly and/or significantly harmful to biota, water quality, hydrology, or beneficial uses. The DEIS ignores various direct, indirect, and cumulative impacts.

4-2

4-2

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According to the EIS Steering Committee, no scientific basis could be established for arriving at an environmentally \_acceptable\_ amount of stream loss and it is \_difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites.

It is claimed that \_[b]etter stream protection from direct and indirect effects would result\_ from the examined alternatives (ES-9). This is a blatant falsehood. Discarding the 100-foot buffer zone rule is proposed.

The rule would be \_clarified\_ out of existence by saying it does not apply to MTR/VFs. Doing this is NOT an \_operation[] designed to avoid and minimize adverse effects\_ (id.) This is perhaps the quintessential impropriety that exposes the fundamental insufficiency of the examined alternatives.

Economic studies show that even the strictest size limits would have minimal impact on jobs, the economy, and electricity prices.

Instead of putting a halt to stream degradation and the on-going violations of the CWA that MTM/VF entails, the preferred alternative would exacerbate and perpetuate this illegal non-compliance. In other words, it is proposed to give even more discretion (through \_enhanced coordination\_ of regulatory schemes) to the agencies (OSM and COE) that have miserably failed to protect aquatic and terrestrial habitat and biota as well as human communities and water in the past.

It is even proposed to come up with a manual for the \_replacement of aquatic resources\_. Aquatic \_resources\_ need to be protected, NOT replaced (with who knows what).

It is projected that mining operations would eliminate almost 7% of the Appalachian forests (2200 square miles) by 2012. Around 1200 miles of streams have already been damaged by \_valley fills\_; over 700 miles have already been buried. And these are probably gross underestimations as smaller headwater streams not on topo maps were ignored. Without additional restrictions, MTR mining would destroy an additional 600 square miles of land and 1000 miles of streams in the next decade. Such vast destruction is unconscionable, indefensible, illegal, and unnecessary.

The total of past, present and estimated future forest loss from MTR/VF is over 1.4 million acres. Such forest losses in West Virginia alone have the potential of directly impacting as many as 244 vertebrate wildlife species.

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Even if hardwood forests can be reestablished in mined areas, which is unproven and unlikely, there will be a drastically different ecosystem from pre-mining forest conditions for generations, if not thousands of years. The mitigation described and promoted in the DEIS does little to meaningfully address this loss.

It is even proposed to continue \_informal consultation\_ regarding compliance with the ESA. This is preposterous, and illegal, on its face.

For evaluating actions as significant as MTM/VF, full compliance demands

thorough \_formal\_ consultation. Instead of positively addressing the significant issue of T&E (and proposed) species, again the desire is simply to \_streamline\_ the process, with the foreseeable result being less consideration of and protection of ESA listed species and populations.

It is proposed to use some vaguely defined \_best-science\_ and \_science-based methods\_ to determine some even more vaguely defined \_high quality aquatic populations\_ and \_high-functioning streams\_. Such equivocations are not the clear disclosure required by law, in addition to being loopholes enough to aid and abet significant destruction and degradation. They fatally expose the illegality of the disclosure and decision-making.

We opposed to mountaintop-removal mining and valley fills. These practices bury important headwater streams, destroy biologically rich forest ecosystems, damage drinking-water sources used by millions of people, cause frequent and severe flooding, and wreck the quality of life in Appalachian communities. Leveling mountains and burying streams is wrong and must stop. A reading of the CWA and SMCRA clearly shows that the government is not only allowed, it is required to prohibit MTR/VF.

We welcome scientific studies that document the widespread and irreversible damage the coal industry is doing to Appalachia. Yet this EIS rejects \_without meaningful consideration\_ specific restrictions on the use of valley fills. These restrictions could be based on size of the fill, cumulative impacts, types of streams affected, or value of the

aquatic and terrestrial resources in the region.

We are opposed to any changes that would weaken the laws and regulations

that protect clean water. In particular, we oppose the proposal to eliminate the stream buffer-zone rule that prohibits mining activity

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within 100 feet of streams. This rule should be strictly enforced for valley fills and in all other cases.

We do not support Alternative 1, 2, or 3 as described in the DEIS report. None of these options will adequately protect Appalachian forests, wildlife, water, or communities.

We are opposed to any changes that would weaken the laws and regulations

that protect our rivers and streams from the effects of mountaintop mining and valley fills. As a result, we are opposed to each of the action alternatives evaluated in the Draft Environmental Impact Statement.

The DEIS contains indisputable evidence of the devastating and irreversible environmental harm caused by mountaintop mining. Other agency studies also show that mountaintop mining contributes to flooding

disasters in mountain communities. Unfortunately, each of the alternatives in the draft EIS ignores various findings of these studies and the very purpose of the EIS - to find ways to minimize, to the maximum extent practical, the environmental consequences of mountaintop mining. The "preferred alternative" would clearly increase the damage from mountaintop mining by eliminating the current limit on using nationwide permits to approve valley fills in West Virginia that are larger than 250 acres, and giving the Office of Surface Mining a significant new role in Clean Water Act permitting for mountaintop mining (a role it does not have under current law). These actions would clearly result in increased environmental harm. Mountain removal mining destroys the scenic beauty of the Central Appalachians, which in turns significantly harms local and regional economies. Our environmental laws require, and the citizens of the region deserve, a full evaluation of ways to reduce the unacceptable impacts of mountaintop mining. I urge you to abandon the "preferred alternative" and to reevaluate a full range of options that will minimize the enormous environmental and economic damage caused by mountaintop mining and valley fills.

These comments are submitted for the organization as well as for the writer personally. Thank you for your consideration.

Sincerely,  
Steven Krichbaum  
Wild Virginia Conservation Director  
412 Carter Street  
Staunton, VA 24401 phone: 540-886-1584  
January 6, 2004

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**The League of Women Voters of Tennessee**

Frances Lamberts, Natural Resources Chair, 113 Ridge Lane, Jonesborough, TN 37659

REC'D JAN 09 2004

January 5, 2004

Mr. John Forren  
U.S. Environmental Protection Agency (3E530)  
1650 Arch Street  
Philadelphia, PA 19103

Re: Programmatic DEIS: EPA 9-03-R-00013

Dear Mr. Forren:

The following statements from the League of Women Voters of Tennessee are in response to the proposal for new regulation on Mountaintop Mining and Valley Fills (MTM/VF). The proposed regulatory framework for mountaintop mining involves a type of MTM permitted or applied for in Tennessee and the DEIS indicates planned expansion of MTM/VF in our state.

The League commends the agencies for undertaking an EIS process in response to accumulating evidence of harm to water, wildlife species and other natural assets. Within the last two decades (cf. DEIS, I-5) MTM/VF operations have climbed into the hundreds per year and the number of acres affected reach into the thousands per year.

We are in full agreement with the need for environmental impacts assessment and appreciate the breadth of research studies undertaken or commissioned by the agencies, and comprehensiveness of study results compiled in the DEIS volumes. Natural resources should be managed as interrelated parts of life-supporting ecosystems. Polluting influences should be controlled so that the physical, chemical, and biological integrity of ecosystems is maintained. Comprehensive data and public participation in decisions about natural-resources management are therefore essential components of an EIS. Based on the review of the information compiled, we state our disagreement with some of the interpretations and conclusions reached and the agencies' recommendations in the proposed alternatives for new regulatory guidance (Alternatives 1, 2, and 3). We have especial concerns, and are opposed to choice of Alternative 2 as "preferred" to embody the regulatory safeguards needed for MTM/VF operations.

The following issues, in particular, are among our principal concerns:

1. The science on mountaintop mining

When areas with MTM/VF sites were compared to unmined sites, the scientific research indicated that the mined sites had been adversely affected in terms of water quality, fish and benthic invertebrates and other aquatic life. Additionally, herbaceous vegetation and forest cover were not well established on the MTM/VF sites.

Programmatic DEIS; page 2

The League's conclusions are drawn from the mainstream science research, mostly published in refereed scientific journals, and the technical studies by agency researchers and consulting firms which were compiled within the DEIS documents. To note just one example of the broad research expertise enjoined in the EIS effort, the Executive Summary for Appendix D (Part 3)—aquatic ecosystem assessment—states

From the spring 1999 through the winter of 2000, U.S. EPA Region 3 personnel facilitated collection of water chemistry, habitat, macroinvertebrate and fish data. ... In addition, data were also collected by three environmental consulting firms, representing four mining companies. The ... U.S. EPA Office of Research and Development assembled [the] data base [and analyzed the data].

However, the DEIS appears to give little or no credence to the bulk of the research findings, whether by prominent academic researchers, or by agency or industry-affiliated researchers such as cited above. The appearance is given of a marginalization of the findings from the bulk of the research, through vague references to "outside" individuals whose studies or opinions "do not necessarily reflect the position.... of the agencies preparing this EIS" (e.g. IIA-2). The agencies make no identification, however, which of the many studies presented, or extensively summarized or referenced in the DEIS or its Appendices volumes the public should consider as reflective of the agencies' position on the documented impacts of MTM/VF mining.

We urge comprehensive and unbiased inclusion of all the research conducted and commissioned for the EIS in evaluation of needed regulatory response to expanded MTM/VF mining. We view the proposed choice of Alternative 2 as contraindicated by the bulk of the research findings.

2. Harm to the water resources.

The DEIS and many of the studies presented or summarized in the Appendices indicate significant damage from past MTM/VF practices. Some 1,200 miles of headwater streams have been impacted and 724 stream miles buried (ES-3 ff). The severity of impacts to streams is evident from the findings in many studies. The study reported in Appendix D (p. 51) notes that

Current mining and reclamation practices result in significant adverse impacts to the first and second order stream ecosystems. At all four sites evaluated, watershed and stream characteristics have been significantly, and in most cases, permanently altered.

In Part 2 of Appendix D, J. Alper of U.S. EPA and J. Stauffer of Pennsylvania State University report

Total number of fish species and benthic species [are] dramatically lower in mined sites than in unmined sites

and detectable levels of selenium in a watershed with MTM/VF sites as likely cause for the depressed aquatic-species counts. A survey of aquatic insects in small headwater streams,

summarized and included in the same Appendix, found the streams associated with active or recent mining contaminated with sediment loads and the

benthic macro invertebrate communities at all the test sites ... severely impaired, [the impairment] expressed through a decrease in diversity, a reduction or [even] absence of pollution-sensitive species ... and an increase in pollution-tolerant species.

Headwater streams are critically important to biological health of receiving streams. Further, even perennial streams begin in very small watersheds of a median 41 acres or less (DEIS, ES-4) and, in Appalachia, originate on steep mountain slopes. MTM/VF operations should therefore be expected to create substantial risk potential for runoff and sediment and other pollution in watersheds in this terrain, as indeed the preponderance of research investigations show.

The river systems that traverse the area being considered for expanded MTM/VF mining in Tennessee—the Powell, Clinch and Tennessee, Sequatchie, Obed and Emory rivers—all have varying numbers of tributaries or river segments with currently impaired status for water quality, or have unique scenic or biological assets in other segments (as the Obed and Clinch-Powell rivers). We consider MTM/VF mining in the watersheds of these rivers to create significant additional impediments to restoring water quality and additional risk factors to maintaining the natural assets they now harbor.

### 3. Environmental safeguards: Alternative 2

In several respects, the preferred alternative (Alternative 2) would worsen damaging impacts from MTM/VF activities and weaken current regulatory protections. Most important among these is abrogation of requirement for individual permit review in favor of general use of the nationwide-permit (NWP21) process. Since specification of definitive limits on size of MTM/VF operations or on linear stream impacts is lacking, a presumption of adequacy of permitting under the NWP process seems to us unjustified, especially, as well, given its lack of public-participation opportunity and curtailment of the consulting role of the U.S. Fish and Wildlife Service. Mitigation for water impacts appears to be being required only to an undefined "appropriate level" rather than to categorical standards or defined criteria such as state water laws, e.g. our state's Water Quality Criteria typically contain. We are opposed to infringement on states' authority to protect their resources, through stringent environmental regulation even exceeding national guidelines. We read the mitigation and several other provisions in Alternative 2 as infringement on states' authority in this respect. Alternative 2 appears also to be seeking to "finalize" the stream buffer protection rule (SBZ), which we consider an imperative need to maintain and strengthen. We also consider an affirmative, evaluative and consulting role for agencies like the U.S. Fish and Wildlife Service and the state's Natural Heritage Program as critically important to protection of terrestrial and aquatic biological and botanical assets. We read the proposal as limiting the wildlife agencies' role to one of end-of-process mediation of "unresolved ESA issues" rather than maintaining or strengthening their contribution early on and throughout the evaluation-decision process, to assure that species-impact issues do not arise. We are opposed to any reduction of the

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wildlife agencies' function in permitting of MTM/VF activities.

### 4. Harm to the forest resources

The hardwood forest on mountain slopes, in the Cumberland as well as the far-eastern region, are Tennessee's most important economic and natural asset. They define the region, its history and culture. They are synonymous with Tennesseans' and tourists' perception of scenic beauty and of fishing/hunting and other forms of outdoor recreation. They are the very essence of what the citizens feel and the state tourism agencies attempt to market as what "sounds good" about Tennessee.

We believe that this resource will be adversely affected, in potentially very significant and potentially irreversible ways by MTM/VF mining. Several reasons underlie this conclusion.

- One, as is known from research on effects of clearcut logging, herbaceous ground-level plants do not reestablish themselves to their pre-logging diversity and richness, even within a hundred years.
- Second, as various of the reported studies indicate, the complete disruption of soil strata through VTM/VF mining, and reconstitution of a rock + rubble + nutrient amended "topsoil" layer has not been found to be hospitable to re-colonization by trees and herbaceous vegetation.
- Third, issues and research discussed in the DEIS (cf. III.B-12 ff) suggest inherent obstacles to forest reclamation through need to assure such tight soil compaction, post mining, to prevent instability and land-slide risks that root penetration is impeded and effective re-growth of a species-rich forest essentially precluded. As the DEIS makes clear (III.B-9),

even when the [post mining] reclamation plan calls for the *planting* of trees, excessive compaction of the rooting medium, which severely reduces tree growth, is the norm (emphasis added)

- Fourth, an inherent obstacle is need for expeditious, grass-type vegetation cover to prevent high runoff from mine sites and risk of degradation of streams. This, prompt-cover expediency acts to further depress germination and growth chances for whatever tree and herbaceous-plant seeds might have made it into the post-mining, reconstituted "topsoil" layer. The result, it appears to us, will be inevitable diminishment and fragmentation of our remaining, native hardwood forest, at least for the lifetimes of several generations of Tennesseans.

A study described extensively in Appendix E (S. N. Handel et al., Rutgers University) shows the profound changes in forest composition that has resulted from VTM/FV mining. Its Table 5 of woody species (trees and shrubs) inventoried at undisturbed forest and mined-forest sites shows the 25 natural-forest sites to contain 110 different species while the 25 mined sites contain only 58. The former sites, moreover, contain the trees we familiarly associate with Appalachian forest, such as the hickories and oaks, hemlock and Fraser magnolia and sugar maple, and the vines, small trees

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and shrubs which make up their beautiful understory, i.e. rhododendron and mountain laurel, redbud, dogwood and azalea, witch hazel and Dutchman's pipe and others. All these were absent or exceedingly rare on the mined sites. Third, presence and spread of alien species was far lower in the forest versus the mined sites (12 and 41 specimen, respectively) and several of the most aggressive non-native species, such as Japanese honeysuckle, empress tree and Lespedeza were present only on the mined sites. This finding is consistent with other data, e.g. from the U.S. Forest Service Western Research Station showing undisturbed forests to act as "bulwark" against invasion of both insect and disease infestations and spread of alien species. These benefits will be lost to the extent that MTM/VF operations further fragment our remaining native forest and their post mining soil impedes forest reclamation.

Dr. Handel's report also indicated adverse impacts on populations of forest birds from the further loss and fragmentation of native forest habitat through MTM/VF mining.

Efforts have been initiated by the Office of Surface Mining, as reported (e.g. III.B-12), to promote post-mining reforestation. This, however, appears to be aimed at production of commercial monoculture pine stands, as suggested by numerous references to the desired, "productive forests" in such terms as

The forestry reclamation approach basically entails ... planting valuable crop trees for their commercial value to the landowner ...; reclamation techniques related to white pine productivity ...; forests economically viable for timber production

In Tennessee, much forest land has already been given over to plantations of pine trees. In the 80s decade alone (*Tennessee Statistical Abstract, 2000*), commercial forest land in pine quadrupled in the Cumberland plateau region and increased more than sevenfold in the eastern region. The ongoing forest conversion has been accompanied by the most damaging pine-bark beetle infestation, in recent years, that the state has ever faced.

Figures compiled by the Tennessee Division of Forestry indicate that southern pine beetle (SPB) related financial losses to private and commercial forest landowners have exceeded \$28 million in three Cumberland Plateau counties alone (Anderson, Campbell, Claiborne), during the 1998-2000 time span. For the state, the timber-loss cost for these three years exceeded \$380 million. Private landowners were not the only victims of this financial burden. Costs to the U.S. Forest Service for control measures in the Cherokee National Forest were nearly \$60,000 and to the Park Service for control measures in the Big South Fork National Recreation Area \$2,670,000. Costs to municipalities, utility districts, and the state transportation agencies also were very high. Cleanup expenses to the Tennessee Department of Transportation, in east Tennessee alone approximated \$800,000, and those to two utility districts in that area approximated \$756,000.

The total, minimal economic losses to our state from the recent SPB outbreak have been estimated at \$445 million.

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Pine monoculture stands for the benefit of short-rotation, commercial timber can therefore not be considered an optimal or even desirable form of forest reclamation. Feasibility of pine culture on mining-reclaimed land is also unproven. Both the research findings cited above, and examples which could be cited from our own state (e.g. a barren post-mining area in the Fall Creek watershed) attest to this. Such "forests" have serious ecological shortcomings, additionally to greatly increased insect vulnerability and high cost to the state from insect outbreaks. Their barrenness as habitat for most plant and animal wildlife and their risks to the water resource through intensive chemical-treatment need make them an undesirable substitute for Tennessee's mountain hardwood forests.

### 5. Public participation

The DEIS indicates that, in addition to three scoping meetings in West Virginia in February 1999, one meeting each was held with citizen groups in West Virginia and Kentucky in December '99 and one each with mining industry groups in these states, in December '99 and January 2000. No public meetings appear to have been held since the Preliminary Draft EIS of 2002--the result of agency response to the issues raised by the public--was changed to the current DEIS. The significant alterations, such as removal of acre limits for valley fills in watersheds of different streams appear to have been made without benefit of citizen participation regarding the issues involved, the decisions made and the regulatory approaches proposed. No public meetings appear to have been held in Tennessee.

Regarding the current DEIS, availability on the World Wide Web is of some help but access to this resource is not universally available. Three of the Tennessee public libraries closest to the responder, reported to have been "sent copies of [the] Draft Programmatic Environmental Impact Statement on Mountain Mining / Valley Fills in Appalachia" (DEIS VII-1, VII-3) were unaware of having received them.

We would recommend closer attention by the agencies that copies for public access are, in fact, sent and received and that public-institution recipients have awareness both of their importance and of need of accessibility to the public until closure of the comment period.

We were able to review the documents at the Knoxville offices of the Office of Surface Mining and would like to acknowledge exemplary helpfulness of the staff of this agency in facilitating the review effort.

Since the agencies' proposed, preferred alternative would, we believe, disallow public participation for most permits through institution of nationwide rather than individual review, we reject Alternative 2 on these grounds.

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Programmatic DEIS, page 7

## 6. Recommendations

The League of Women Voters of Tennessee opposes VTM/VM mining because of its many adverse and severe impacts on the natural resources and, therefore, on our economic health in the longer term. We believe that the current regulatory framework should be strengthened. However, consolidation of permitting procedures as envisioned in the proposed alternatives and elimination of some current provisions such as the SPZ rule in the wake of consolidation will not achieve strengthening but will weaken the current protections. We therefore urge consideration of the following recommendations:

In all resource-protection matters regarding mountaintop mining, including especially CWA Section 401 certification, the states' regulatory authority should continue to be upheld.

States' authority to deny valley fills in mountaintop mining operations should be upheld.

Because of their many site-specific characteristics, permits for MTM/VF operations should be approved under the individual rather than the general-permit review process.

States' authority to protect high-quality and Tier III waters, and to maintain their water laws' anti-degradation standard should remain intact.

Valley fills, where permitted, should have acre limits adjusted to size of watersheds or the nature of streams being affected.

Full evaluative participation and consultative authority of state and federal wildlife agencies should remain intact.

Opportunity for public participation in permit decisions involving MTM/VF activities should not be abridged. Public hearings on the Draft EIS should be conducted in all the four states to which the resultant regulations would apply.

The scientific information on MTM/VF mining should be fully evaluated and all implications of its findings considered in the shaping of regulatory guidance. This is demanded by both the cost to the public in agencies' commissioning or conducting the scientific research, and by sound decision making that protects the public interest in proper management of our natural-resources assets.

We thank you for considering comments from the League of Women Voters.

Sincerely,

*Frances Lamberts*

Frances Lamberts, Natural Resources Co-Chair, LWV-TN

PC Sharon Fidler, President, League of Women Voters of Tennessee  
The Honorable Phil Bredesen, Governor of Tennessee



# Scenic America

REC'D JAN 14 2004

January 5, 2004

Mr. John Forren  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

On behalf of the Board of Scenic America, I am writing to urge the Bush Administration to stop mountaintop removal by coal companies. This practice will destroy Appalachia's scenic beauty, will wipe out forests and the critical habitat they contain, bury streams, and threaten communities.

According to the Administration's draft Environmental Impact Statement (EIS) on mountaintop removal coal mining, the environmental effects of mountain top removal are widespread, devastating, and permanent. Yet the draft EIS proposes no restrictions on the size of valley fills that bury streams, no limits on the number of acres of forest that can be destroyed, no protections for imperiled wildlife, and no safeguards for the communities of people that depend on the region's natural resources for themselves and future generations.

The Administration's "preferred alternative" for addressing the problems caused by mountaintop removal coal mining is to weaken existing environmental protections. This "preferred alternative" ignores the administration's own studies detailing the devastation caused by mountaintop removal coal mining, including:

- over 1200 miles of streams have been damaged or destroyed by mountain top removal;
- forest losses in West Virginia have the potential of directly impacting as many as 244 vertebrate wildlife species;

Without new limits on mountaintop removal, an additional 350 square miles of mountains, streams, and forests will be flattened and destroyed by mountaintop removal mining. In light of these facts, we urge you to consider alternatives that reduce the environmental impacts, including the scenic impacts, of mountaintop removal. Thank you for your consideration of this important issue.

Sincerely yours,

*Meg Maguire*  
Meg Maguire  
President

801 Pennsylvania Ave., SE  
Suite 300  
Washington, DC 20003

Phone (202) 643-6200  
Fax (202) 643-9120  
E-mail scenic@scenic.org

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REC'D JAN 12 2003

January 3, 2003

John Forren  
U.S. EPA (3EA30), 1650 Arch Street  
Philadelphia, PA 19103

Draft Programmatic Environmental Impact Statement on Mountain Top Mining/Valley Fill (MTM/VF) in the Appalachian region of the eastern United States.

Dear Mr. Forren,

Please accept these comments on behalf of the Upper Cumberland Group of the Tennessee Chapter of the Sierra Club.

We write because of our concerns that the environmental degradation and destruction of mountain forests, valleys and waters that has occurred in West Virginia and Kentucky from this type of mining not be repeated in Tennessee or throughout the Appalachian coalfields. Our experience in looking at the Environmental Justice, NEPA, Endangered Species and Clean Water Act issues connected with the mountaintop mining project at Zeb Mountain in Campbell County Tennessee leaves us to conclude that this type of mining (here called "cross-ridge" mining, but we believe essentially the same as mountaintop removal) cannot be accomplished without devastating destruction of affected streams and creeks and the eco-habitat for many species.

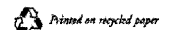
While we understand and agree with the need to address the vital water protection issues involved in this type of mining, the narrow focus of the three alternatives in the DEIS on interaction between the agencies does not account for other possible alternatives - ie. deep mining or no mining. As the U.S. Fish and Wildlife Service said in its September 2002 memo, the three 'action' alternatives, as currently written, cannot be interpreted as ensuring any improved environmental protection ... let alone protection that can be quantified or even estimated in advance."

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The No Action alternative assumes that mining - and mountaintop mining - will continue, but looks only at the issues of whether any change should be made in how the agencies (OSM, the Corps and EPA) interact.

Tennessee has a unique situation among the four states involved in the DEIS in that the federal OSM has SMCRA jurisdiction here. This means compliance by OSM with NEPA is required here and that should involve early consultation with the Corps and with EPA - and with the state of Tennessee's Department of Conservation and Environment. This is not being done. The recent permitting of over 2100 acres at Zeb Mountain is a prime example.

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Because of the difference in the agencies having jurisdiction to administer SMCRA, we do not believe that Tennessee should have been included in this DEIS.<sup>1</sup>

Whatever the jurisdictional vagaries of the different states, it is essential that all permits required to protect water quality be issued, with appropriate public notice, comment and hearings, prior to the issuance of the SMCRA permit and commencement of the mining. Due to the unique quality of the forests and diversity of rare and endangered terrestrial and aquatic species in the region of this DEIS, individual Section 404 permits are required under the Clean Water Act

The DEIS recognizes that the forests, streams and creeks of Appalachia are some of the most biodiverse in the world. Tennessee is one of the last remaining habitats for the federally threatened Indiana bat. Several neotropical birds, such as the Cerulean and Golden warbler, deemed "in need of management" by the State, are finding a last refuge in the forests of the Upper Cumberland region of Tennessee. The Cerulean warbler, in particular, needs deep forests to survive.

The DEIS fails to adequately assess the cumulative impacts to the forests from future stripmining and the cutting in the region that is predicted by the Southern Forest Resource Assessment.

The Southern Appalachian ecoregions are well known for the richness and rarity of their terrestrial and aquatic species. There is no doubt that the heavy sedimentation of the streams involved in a mountaintop mining situation makes those streams inhabitable for many aquatic species. The DEIS correctly recognizes that the Southern Appalachians have one of the richest salamander faunas in the world. The DEIS fails to recognize that salamanders and mussels, for example, have a particular difficulty adapting or changing habitat to new streams.

All terrestrial and aquatic animals may have difficulty surviving largescale mining projects when the reclamation is not reforestation, but to grasses and non native plants.

The DEIS correctly recognizes that the Southern Appalachians contain some of the last remaining stands of a forest type that was once spread over the northern hemisphere and that these rich deciduous hardwood forests are increasingly threatened. Tennessee's hardwood deciduous forests, the mixed mesophytic, are the seedbed for many plant species and habitats.

Yet the DEIS fails to fully consider the value of these forests and the terrestrial and aquatic species dependent on them and the very real predictability of their destruction - and extinction- by widespread mountaintop mining and valley fills.

The DEIS makes false assumptions about the value of the coal produced, underestimates the costs of mitigation measures and of cleaning up the water, and fails to consider the adverse health consequences of increased coal burning by coal burning power plants due to increased

<sup>1</sup>The DEIS does not adequately address certain issues specific for Tennessee, when it addresses specifics for the other states, i.e. the extent of remaining coal surfaceminable seams in Tennessee or remaining issues specific to Tennessee.

coal supply. The economic value of the losses to the region's tourism industry from the degraded environment are not given adequate consideration.

The DEIS description of the choice of different mining methods and the associated costs looks only at maximizing the coal recovery in the least expensive possible way and does not adequately factor in the value to the environment of environmental protection measures. Stream mitigation and permitting costs are underestimated, as well as dangers from possible dam or sediment basin breach and from the long term effects of acid and coal mine drainage.

Due to the massive size and devastating effects of these mountaintop mining operations, many streams and watersheds are affected. So much water is difficult to protect. The DEIS fails to consider the long term effects on ground water hydrology from widespread mountaintop mining. Such effects can be predicted to be very significant. Bonta, J.V, C.R. Amerman, W.A. Dick, G. F. Hall, T.J. Harlukowicz, A.C. Razem, and N.E. Sneek. "Impact Surface Surface Coal Mining on Three Ohio Watersheds -Physical Gonditions and Ground Water Hydrology" *Journal of the American Water Resources Association*, Volume 28, Number 3, June, 1992, 577-596 at 593.

The DEIS assumes a great value for man-made ponds or basins as a means of controlling sediment. According to the Stormwater Center, "... few (sediment basins) are probably capable of consistently removing 70% of the incoming sediment, much less the 95 to 99% removal that is typically assumed," and measures to increase the solids trapping efficiency of sediment basins are rarely incorporated into the design (Stormwater Center 2003). Stormwater Center (2003). "Improving the Trap Efficiency of Sediment Basins." Technical Note #84, Watershed Protection Techniques. 2(3): 434-439 (<http://www.stormwatercenter.net>)<sup>2</sup>

The DEIS recognizes the value of headwater streams to the river ecosystem. Doppelt, et al 1993. "Even where inaccessible to fish, these headwater streams provide high levels of water quality and quantity, sediment control, nutrients and wood debris for downstream reaches of the watershed. Intermittent and ephemeral headwater streams therefore are often largely responsible for maintaining the quality of downstream riverine processes and habitat for considerable distances."

Yet, the following quotes indicate that the DEIS recognizes that the dangers of valley fills and the potential offsetting values of sediment basins need further study.

"Filling or mining stream areas even in very small watersheds has the potential to impact aquatic communities some of which may be high quality or potentially support unique aquatic species." DEIS - III-D-4. It has not been determined if drainage structures connected with mining can provide some benefit."

<sup>2</sup>At the Zeb Mountain site in Tennessee, after only a few months of mining in a 10 year life of mine operation, total suspended solids readings in a major stream (home of the federally threatened fish the blackside dace) have already been consistently more than ten times the permit limits. We submit that the coal industry's use of the Sed Cad 4 and OSM's permitting procedures are based on faulty modelling and inadequate predictions for sediment loads in sediment basins.

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"Further evaluation of stream chemistry and further investigation into the linkage between stream chemistry and stream biotic community and structure are needed." DEIS- III-D-7.

"While these studies illustrate that mining and valley fills may alter the sediment composition of streams, it is not known if this change may impact functions of streams downstream or how long those impacts may last. Assessment of stream sediment characteristics should be included in any further evaluations or monitoring program for streams downstream from mining and valley fills." DEIS- III-D-8

"... potential impacts from valley fills to stream chemistry and possible alterations to stream geomorphology were discussed as areas of further need for investigation" DEIS -III-D-11

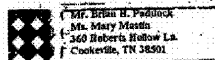
We submit that because these further studies are needed, this Draft Environmental Impact statement is incomplete.

Finally, the DEIS fails to consider the adverse health consequences to the population in the region (and in the nation) of increased coal burning by coal burning power plants due to increased coal supply from increased coal mining in this region. The Eighth Circuit Court of Appeals recently found that NEPA required the Surface Transportation Board to consider the indirect adverse impacts of increased coal supply on air quality. *Mid-States Coalition for Progress v Surface Transportation Board of America*, No. 02-1359 (8<sup>th</sup> Cir. October 2, 2003).

Mountaintop mining and valley fills have the potential, due to downstream reach and widespread air quality impairment, for a devastating impact on areas much larger than those permitted. We believe that it is a serious mistake - and self destructive act - for this human species to risk extinction of so many other species all in the sake of pursuing a noxious source of energy which has been shown to have harmful health consequences for us all.

We suggest that this draft Environmental Impact Statement must be re-done for additional studies and issues to be assessed.

Thank you for the opportunity to make these comments.



Sincerely

*Mary M. Mastin*

Mary M. Mastin  
Conservation Chair, Sierra Club  
Upper Cumberland Group

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**Save Our Cumberland Mountains, Inc.**  
**224 South Main Street, Suite 1**  
**P. O. Box 479**  
**Lake City, Tennessee 37769**

January 2, 2004

Mr. John Forren  
U.S. Environmental Protection Agency (3EA30)  
1650 Arch Street  
Philadelphia, PA 19103

e-mailed to EPA: [mountaintop.c1@epa.gov](mailto:mountaintop.c1@epa.gov)

RE: Comments on [Federal Register: May 30, 2003 (Volume 68, Number 104) [Notices] (Pages 32487-32488), DEPARTMENT OF DEFENSE, Department of the Army, Corps of Engineers, ENVIRONMENTAL PROTECTION AGENCY, DEPARTMENT OF THE INTERIOR, Office of Surface Mining and Fish and Wildlife Service, Draft Programmatic Environmental Impact Statement, AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; Environmental Protection Agency; Office of Surface Mining and U.S. Fish and Wildlife Service, U.S. Dept. Of the Interior; and West Virginia Department of Environmental Protection, ACTION: Announcement of Draft Programmatic Environmental Impact Statement (DPEIS) availability and notice of public hearings. Comment deadline is January 6, 2004]

Dear Mr. Ferron,

The Stripmine Issues Committee of **SAVE OUR CUMBERLANDS MOUNTAINS, INC.** (SOCM) is submitting the following written comments on the above agencies announcement of the Mountaintop Mining and Valley Fills in Appalachia. The Draft Programmatic EIS considers new or revised program, guidance, policies, or regulations to minimize, to the maximum extent practicable, the adverse environmental effects of mountaintop mining and valley fill operations within the Appalachian study area in West Virginia, Kentucky, Virginia and Tennessee. Written comments on the Draft Programmatic Environmental Impact Statement (PEIS) must be received by January 6, 2004.

Our comments will address concerns within the Draft PEIS with any mountaintop mining and valley fills operations in Tennessee and its domino effects on Tennessee's citizens, its watersheds and individual county's economic growth plans, and the State of Tennessee and EPA Water Agreement. SOCM membership is composed of citizens who believe that they have an inherent power and right to affect the course of our lives and surroundings. SOCM is committed to using this power to improve the quality of life in our communities.

SOCM believe that citizens have a right to know about and have a voice in developments that affect us and communities. SOCM membership is concerned with the Draft PEIS lack of addressing potential cumulative problems created from long term impacts of "Mountaintop Mining and Valley Fills" and "Mountaintop Removal Mining" and "Crossing Ridge Mining" operations which results in problems with restoration, maintenance and protection of water resources found in the 22 county area of the Tennessee coal fields.

EPA's national water program has worked with the State of Tennessee to create comprehensive state watershed approach strategies that actively seeks a higher standard of protection for the human environment. In an agreement with EPA, the state of Tennessee must identify all streams and lakes that do not meet water quality standards or do not have the required control strategy in place, must develop strategies to identify pollution sources, and purpose water quality improvements, beginning with the highest priority streams. The Draft PEIS does not address how federal agencies and the State of Tennessee plan to maintain the comprehensive state watershed approach strategies and grant proposed mountaintop mining and valley fills and mountaintop removal operations and cross ridge mining operations projects. "Mountaintop mining operations in the Appalachian coalfields involved fundamental changes to the region's landscape and terrestrial wildlife habitats." [EPA, OSM, COE and FWS Preliminary Mountaintop Mining PEIS, January 2000] Mountaintop mining and valley fills would change the Tennessee's watersheds into wasteland of grassy knolls. With the increasing size of mountaintop mining operations, a single permit could change thousands of acres of Tennessee's hardwood forests, seriously pollute streams, and damage the sensitive ecological diverse watersheds. Tennessee's ecoregions serve as a geographical framework for establishing regional water quality expectations. Tennessee's watershed approach serves as an organizational framework for systematic assessment of Tennessee's water quality problems. This unified approach affords a more in depth study of each watershed in the Tennessee coalfields and encourages coordination of public and governmental organizations. The proposed Draft PEIS fails completely to address how the proposed federal action will impact Tennessee's Watershed Management Approach program.

The proposed federal action on mountaintop mining and valley fills, mountaintop removal mining and cross ridge mining operations weakens the State of Tennessee's, U.S. Army Corps of Engineers', U.S. Fish and Wildlife Service's and EPA's standards for the highest priority of environmental management programs and protection policies to address problems associated with hydrologically-defined geographic areas and ground and surface water flow in the sensitive ecosystem watersheds of Tennessee's coal fields. The Draft PEIS for mountaintop mining and valley fills under current review weakens Tennessee and federal guidelines and principles of assessing proposed federal actions by partnerships, geographic focus and sound management techniques based on strong science and the latest data. Federal agencies continue to "re-act" to mine related problems instead of anticipating problems.

Over the past two decades, the Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (COE), U.S. Fish and Wildlife Service (FWS) and the Office of Surface Mining Reclamation and Enforcement (OSM) have achieved important reductions in discharged pollutants to the Nation's air, lakes, rivers, wetlands, estuaries, coastal waters,

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and surface and ground waters. These successes have been achieved by controlling point sources of pollution and enforcing high standards. The Clean Water Act was a major role player in achieving these improvements in our Nation's drinking water supply. The proposed changes to mountaintop mining and valley fills permitting would seriously damage all federal agencies' credibility and accountability to the American public to restore and maintain the chemical, physical, and biological integrity of our Nation's waters. The Draft PEIS usage of the so-called "Study Areas" data for Tennessee which consist of data from known violators of SMCRA regulations and the Tennessee Division of Water Pollution Control - Mining Section's NPDES regulations is being used to misinterpret how the Tennessee Federal Program is addressing program-wide impacts and support of program-level decisions related to mountaintop mining and valley fills. The Programmatic EIS should discard all data from the Tennessee Federal Program in reviewing mountaintop mining and valley fills.

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EPA, FWS, OSM and COE emphasis must be on raising the bar to a high standard to strengthen the public trust and sustain long-term environment improvements to our Nation's drinking water supply. The Draft PEIS does not achieve these high standards in its current form. Nationwide, the Draft PEIS only allows legal loopholes for coal industry operators and federal agencies to weaken the Clean Water Act of 1977 (CWA) and the Surface Mining Reclamation and Control Act of 1977 (SMCRA). In Tennessee it weakens the Tennessee Water Quality Control Act, and the Tennessee Code Annotated 69-3-101 to 69-3-137, and the Tennessee Safe Drinking Water Act of 1983, TCA 68-221-701 to 68-221-720, and the Tennessee Federal Program, 30 CFR Subchapter T, Part 942 - Tennessee.

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SOCM is concerned that the proposed Draft PEIS including Tennessee with states that have actual mountaintop removal mining sites with approved SMCRA permits. The study area data provides partial useful information while much of the data is too outdated to apply to the criteria stated in the February 5, 1999 Notice of Intent. [64 FR 5778] Particularly alarming are the differences between the Preliminary PEIS of January 2000 and the Draft PEIS of May 2003. The data from Tennessee's "Study Area" is misleading to the overall impact assessment in the Draft PEIS.

SOCM finds the Draft PEIS document to be inadequate and too deficient to adequately evaluate the Tennessee Federal Program and its program-wide impacts and support program-level decisions that are reasonable and defensible. The Draft PEIS evaluation does not provide complete environmental review and cost analysis of the array of issues concerning the natural and built environmental concerns. Key environmental advantages and disadvantages such as habitat loss, changes in land use, siting difficulty, sediment requirements and potential long and short-term consequences, monitoring needs and aesthetic impacts are not adequately address. The Draft PEIS does not address how the proposed federal action will affect the State of Tennessee own environmental and economic development policies.

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While the proposed Draft PEIS addresses issues from the eyes of federal agencies and the political powers that be in Washington, DC, it fails to address the serious concerns that mandated the PEIS. Chief U.S. District Judge Charles Haden opened the eyes of America

to the serious damage being done to the Appalachian region of America. [cite Judge Charles H. Haden's decision October 1989, Bragg v. Robertson, (Bragg, U.S. District Court, Civil Action No. 2:98-0636 S.D. WV) Judge Haden's bold position to hold federal agencies accountable for their actions should be the guiding light in drafting any proposed PEIS to address significant impacts to our Nation's drinking water supply. The current Draft PEIS does not meet its original intent under NEPA. The Draft PEIS only priority is to support the use of mountaintop mining and valley fills, mountaintop removal mining and cross ridge mining and other types of surface coal mining in the Appalachian coalfields.

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Sincerely,

LONDON MEDLEY, Chair  
SOCM, Stripmine Issues Committee

SOSM Staff Contact:

Jonathan Dudley, Organizer

CC: (Text only, no attachments)

Katherine Trott, U.S. Army Corps of Engineers, Washington, DC  
Michael Robinson, U.S. Office of Surface Mining, Pittsburgh, PA  
Cindy Tibbitt, U.S. Fish and Wildlife Service, State College, PA  
Russell Hunter, West Virginia Department of Environmental Protection, Nitro, W.VA.  
Governor Phil Bredesen, Nashville, TN  
U.S. Senator Bill Frist, Washington, DC  
U.S. Senator Lamar Alexander, Washington, DC  
U.S. Representative Lincoln Davis, Washington, DC  
Commissioner Betsy Childs, TDEC, Nashville, TN

## EXECUTIVE SUMMARY AND SAVE OUR CUMBERLAND MOUNTAINS, INC. POSITION ON MOUNTAINTOP REMOVAL MINING AND CROSS-RIDGE MINING

The Draft Programmatic Environmental Impact Statement (PEIS) was prepared by the U.S. Army Corps of Engineers (COE), the U.S. Environmental Protection Agency (EPA), the U.S. Department of Interior's Office of Surface Mining (OSM) and U.S. Fish and Wildlife Service (FWS), and the West Virginia Department of Environmental Protection (WVDEP). The purpose of this EIS was to evaluate options for improving agency programs under the Clean Water Act (CWA), Surface Mining Control and Reclamation Act (SMCRA), the Fish and Wildlife Coordination Act (FWCA) and the Endangered Species Act (ESA) that would contribute to reducing the adverse environmental impacts of mountaintop mining operations and excess spoil valley fills (MTM/VF) in Appalachia.

Preparation of this Draft PEIS was intended to address substantial information gathering and relevant historical data, detail several possible alternative policy frameworks, and contains the result of scientific and technical studies conducted as part of an effort to address significant cumulative environmental impacts due to mountaintop mining and to address impacts from Mountaintop Removal Mining operations pursuant to the agreement in the settlement agreement known as Bragg v. Robertson, Civ. No. 2:98-0636 (S.D. W.V.). This is a "programmatic" EIS consistent with the National Environmental Policy Act (NEPA) in that it evaluate board Federal actions such as the adoption of new or revised agency program guidance, policies, or regulations. "Mountaintop mining" refers to coal mining by surface methods (e.g., contour mining, area mining, and Mountaintop removal mining) in the steep terrain of the central Appalachian coalfields. [PEIS, Executive Summary, page ES-1, 2003]

This Mountaintop Removal Mining and Valley Fills data in the Draft PEIS should give more than a cursory investigation into the current and potential impacts of Mountaintop Removal in Tennessee. In the Draft PEIS Tennessee surface coal mining operations are included in some of the data. However the Draft PEIS never examines the history of compliance of these surface coal mining operations in Tennessee, which are included in the Draft PEIS. SOCM opposes Mountaintop Removal and Cross Ridge Surface Coal Mining Operations. These practices are violations of the spirit of federal laws: CWA, SMCRA, FWCA and ESA. Mountaintop Removal and Cross Ridge mining forever alters the landscape and destroys mountain communities. Mountaintop removal is incompatible with long-term economic development opportunities such as tourism.

In Tennessee there have been few if any permits for Mountaintop Removal operations. Instead OSM's Knoxville Field Office has been issuing permits for other types of Mountaintop Mining. Over the past ten years OSM's Knoxville Field Office has issued five permits for "Cross-Ridge Mining". SOCM views Cross Ridge Mining as another type of Mountaintop Removal and is opposed to this practice. The use of a different name for what amounts to basically the same practice is a cynical attempt by the coal industry and

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regulatory agencies to avoid the scrutiny that has been focused on Mountaintop Removal by Judge Haden's decision.

Cross Ridge Mines do not receive a variance from AOC; and purport to restore mountains to their original contour. In some cases this may lessen the need for "Valley Fills" or "Head of Hollows Fills". However so far in Tennessee all Cross Ridge Mines have either been permitted with or revised to have changes to include fills. Even when Cross Ridge Mines do not include valley fills they may be just destructive (through erosion, disturbance of large acreage, and potential slope failure) to public waters as valley fills. SOCM is very concerned about the safety of operation – there is much potential for hazards both to coal industry employees working on site and citizens who live near these mines.

The impacts of Cross Ridge Mining in Tennessee and potential impacts of the practice across the region must be addressed in the Draft Programmatic EIS. The Draft Programmatic EIS for the federal program in Tennessee dedicates only a few paragraphs to this practice under the title Cross Ridge Mountaintop Removal. The Mountaintop Mining Draft Programmatic EIS should take a comprehensive look at Cross Ridge Mining. The Draft PEIS should address concerns about disposal of excess spoil, slope stability, erosion, safety, and technical feasibility related to Cross Ridge Mining.

The Draft PEIS only looks at blasting complaints during the period of June 1998 to July 1999. During this period there were only 6 blasting complaints in Tennessee. We know that at the Cumberland Coal Company site in Cumberland County, Tennessee alone there were more than 10 complaints. We know that current SMCRA regulations allow blasting which damages homes and wells. This study should not use the assumption that compliance with blasting regulations will prevent damage.

The Draft PEIS fails to access the significant direct and indirect impacts of mountaintop mining on the economies of Tennessee's 22 coalfield counties. The Draft PEIS should examine the full cost of surface coal mining operations on the economy, instead of only looking at surface coal mining jobs. The Draft PEIS does not address cumulative impacts of changing the topography and land cover or storage of mine waste in head of hollow fills would have on Tennessee.

Members of Save Our Cumberland Mountains who fought for the federal Surface Mining Control and Reclamation Act of 1977 and created the Applicant Violator System (AVS) program took seriously the provision of SMCRA which says that Mountaintop Removal with a variance from Approximate Original Contour will only be allowed when it is shown there is a better post mining use for the land if it is left flat. These members question whether this standard had even been applied. The wide use of granting a variance from approximate original contour that we have seen in other states is unacceptable and is not in the spirit of the 1977 Surface Mining Control Reclamation Act.

The use of "Valley Fills" and other mining practices that store waste or otherwise alter the waters of the United States are in violations of the Clean Water Act and should not be permitted. Federal agencies should enforce the 100 foot buffer zone and the Clean Water Act. Mountaintop Removal operation by design violates these laws.

SOCM strongly disagree with the premise that better coordination among agencies will address concerns about Mountaintop Removal and Mountaintop Mining. Instead federal agencies should study the impacts of these mining practices and act to protect communities and the environment by not allowing Valley Fills and Head of Hollow Fills, not allowing an Approximate Original Contour Variances, enforcing the 100 foot stream buffer zone, and taking a second look at the feasibility of returning whole mountain peaks to original contour. **SOCM an organization of over 2000 members in Tennessee wishes to go on record opposing "Mountaintop Removal" mining and "Cross Ridge" mining operations in the coalfields of Tennessee and our Nation. SOCM does not support Alternatives #1, 2 and 3 contained within the Draft PEIS.**

Of four states studied in the Draft PEIS, Tennessee is the only state with a Federal Surface Mining Regulatory Program carried out by OSM-Knoxville Field Office. The Draft PEIS should take into consideration the experience if Tennesseans before recommending changes in the amount of authority given to OSM in permitting of Mountaintop Mining and Mountaintop Removal and Cross Ridge mining operations. An examination of the violations in Tennessee would show that OSM has been ineffective in preventing surface mining companies from violating the law. The Draft PEIS should evaluate the record of violations of all the mines by OSM-Knoxville Field Office. The case history records of the Skyline Coal Company, the Eastern Mineral mining site and the Rith Energy operation and others surface coal mining operations are clear examples of bad permitting assessment in Tennessee. Yet, these areas are noted in the Draft PEIS as study areas. This mining operation's record of violations gives a more complete picture of OSM's Mountaintop mining [pursuant to the Draft PEIS definition of MTM/VF] permitting in Tennessee.

In Tennessee, the public participation process is programmatic. Instead of being a time when the public can raise concerns about a mine which OSM takes into consideration in its decision to grant or deny a SMCRA permit, it has become a period during which OSM and a mining company work together to adjust mining plans to avoid concerns raised by the public. OSM-Knoxville Field Office acts as a consultant to the mining companies instead of just evaluating and makes a decision about a permit application.

In the case of Zeb Mountain Cross Ridge Mine in Campbell and Scott Counties, Tennessee, many significant changes were made to the permit application after the public comment period has closed. When OSM-Knoxville Field Office held an informal conference on the permit application many aspects of the application were in flux so it was impossible for local resident and concerns citizens across Tennessee to know what to comment on. Later OSM-Knoxville Field Office used the fact that SOCM members had made multiple visits to the Knoxville Field Office to raise concerns and get information, as a reason for NOT reopening the comment period. But, still citizens across Tennessee were left out of an opportunity to make comments on these changes to the Zeb Mountain original SMCRA permit application.

Tennesseans across the coalfields have been left out of the Draft PEIS comment period process. Scoping has been inadequate; there was no scoping hearing held in Tennessee. Many State agencies were unaware that the Draft PEIS covered more than just

Mountaintop Removal operation with an AOC variance. Most people in Tennessee were not aware of the Draft PEIS. The Draft PEIS fails to provide the best available scientific and technical information that will facilitate a better informed, more coordinated and efficient decision-making process by federal agencies.

The Draft Programmatic EIS should be discarded and return to its original task to prepare a joint voluntary Environmental Impact Statement that will fairly examine agency policies, guidance, and decision-making processes in order to determine whether they can and do minimize, to the maximum extent practicable, adverse environmental effects from Mountaintop Mining, Mountaintop Removal Mining and Cross Ridge Mining operations and the disposal of excess spoil in valley fills. The current Draft PEIS only "rubberstamps" the present policies of federal and state agencies and revised the current procedures to do away with surface coal mining law's buffer zone that prohibits mining activities to disturb within 100 feet of large streams, eliminating the current limit on using nationwide permits to approve valley fills in West Virginia that are larger than 250 acres, and giving the Office of Surface Mining and Reclamation a greater in Clean Water Act permitting. Judge Haden's decision recognizes the damage being done to Appalachia communities. The current proposed Draft PEIS fails to address the irreversible harm to the environment and to communities in the coalfields of our Nation. The Draft PEIS at ES-8 states that approximately 1200 miles of headwater streams "were directly impacted" by Mountaintop Removal Mining and Valley Fills between 1992 and 2002. There is no scientific basis that would confirm an environmentally "acceptable" amount of stream loss. The Mountaintop Mining and Valley Fills EIS Steering Committee agreed that it is "difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites". (August 15, 2002, committee's working draft)

Save Our Cumberland Mountains ask that federal and state agencies and their officials realize that the current regulations, policies, procedures, and guidance has not adequately protected the environment and the citizens of the coalfields of our Nation. The proposed Draft PEIS is a step backward in time to 1976 before the Clean Water Act, the Clean Air Act and SMCRA. Our citizens, their communities and the environment should not become a political toy by the coal industry. SOCM urges that federal agencies step back to the Preliminary Draft PEIS and start all over again to address citizen's original concerns and Judge Haden's decision.

END

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**SAVE OUR CUMBERLAND MOUNTAINS, INC.  
STRIPMINE ISSUES COMMITTEE  
WRITTEN COMMENTS ON  
FEDERAL REGISTER: MAY 30, 2003, PAGES 32487-32488  
DRAFT PROGRAMMATIC ENVIRONMENT IMPACT STATEMENT  
ON MOUNTAINTOP MINING / VALLEY FILLS**

Save Our Cumberland Mountains, Inc. (SOCM) is an organization that was originally founded by citizens and for citizens affected by stripmining activity in eastern Tennessee and the Cumberland Plateau. Many of our members live in the 22 coalfield counties of Tennessee (Appalachia). SOCM has a long-standing history of struggling for citizen's rights to clean and safe drinking water and to live in a safe environment. SOCM is a member of the Citizens Coal Council. The following comments are submitted to specifically address the Draft PEIS 2003 and its contents as it relates to proposals and statements made about mountaintop mining and valley fills in the coalfields of Tennessee.

The definition of "Mountaintop Mining/Valley Fills (MTM/VF) Mining and Mountaintop-Removal Operation used in our comments is pursuant to the Draft PEIS definition found on in Glossary on pages VIII-10 and VIII-11. While the Tennessee Federal Program's definition found in OSM-EIS-18 varies somewhat in its wording, the Draft PEIS should clarify all official definitions for Federal run programs and state run programs. The general public finds it confusing to determine the differences between the "mountaintop mining/valley fills mining" and "mountaintop removal operations" found in the Draft PEIS. SOCM feels that this will cause many problems in written comments being submitted by citizens during the comment period.

The Tennessee coalfields are made up of the following (22) counties: Anderson, Bledsoe, Campbell, Claiborne, Coffee (no coal reserves are known to exist in Coffee County), Cumberland, Franklin, Grundy, Hamilton, Fentress, Marion, Morgan, Overton, the eastern parts of Pickett, Putnam, Rhea, Roane, Sequatchie, Scott, Sullivan, Van Buren, Warren, and White. [see page 3-1, Final Environmental Impact Statement, OSM-EIS-18].

Under NEPA, the primary purpose of an environmental statement is to serve as an action-force device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. [30 CFR Section 1502.1] The draft environmental impact statements shall be prepared in accordance with the scoping process. [30 CFR 1502.9(a)] SOCM feels that the current Draft PEIS is so inadequate as to preclude meaningful analysis that a revised draft PEIS should be done. The current Draft PEIS fails to assess the significant direct, indirect and cumulative impacts of large-scale mountaintop mining and valley fills on each individual watershed communities in Tennessee. The analyses of Tennessee's coalfield counties and the State of Tennessee's economic development and community growth plans are weak in evaluating impacts to long-term growth plans. "Environmental impact statements shall serve as the

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means of assessing the environmental impact of proposed actions, rather than justifying decisions already made." [30 CFR Section 1502.2(g)] Federal agencies must, at a minimum, comply with the CEQ NEPA regulations when conducting their programs. The Draft PEIS has not taken a "hard look" at the cumulative environmental impacts of mountaintop mining; the viability of reclaimed streams compared to natural waters; the impacts that filled valleys have on aquatic life; wildlife and nearby residents; biological and habitat analyses that should be done before mining begins; ways to avoid and minimize stream filling; and the effectiveness of mitigation and reclamation.

The Draft PEIS should analyze the comprehensive impacts to the human environment of decisions by federal agencies resulting from all types of coal mining conducted under the Tennessee Federal Program. The Draft PEIS should analyze the cumulative impacts that would result from any proposals to change current policies. Since October 1, 1984, OSM implemented a Federal program for the regulation of surface coal mining operations in the State of Tennessee. [page 1-1, OSM-EIS-18] The Draft PEIS proposed to change portions of the current program policies to address mountaintop mining and valleys fills. This may effect the State of Tennessee statutes or regulations. The Draft PEIS needs to document what effects the Draft PEIS proposals will have on State of Tennessee's statutes and regulations. The current Draft PEIS has volume after volume of documentation on Kentucky, Virginia and West Virginia while very little documentation is given on Tennessee within the Draft PEIS. The federal agencies' press releases refer to better federal interagency commitment to require significantly better environmental review and protection measures.

The Draft PEIS needs to analyze all types of coal mining operations under the Tennessee Federal Program. Underground and surface coal mining methods, reclamation procedures associated with each method, and coal preparation plants and tipple operations that are described in the OSM-EIS-18. Underground coal mining, Surface mining, Area mining, Dozer-loader-truck area mines, Contour mine, Augering, and Mountaintop Removal operations data should be part of the analyzed data in the Draft PEIS. The Draft PEIS should state what impacts the proposed policy changes would likely have on these methods of mining operations under the Tennessee Federal Program.

Mountaintop removal is the removal of entire mountaintop down to the bottom of the lowest coal seam being recovered. [page 3-9, OSM-EIS-18] Mountaintop Removal Operations, includes, those mines that remove all or a large portion of a coal seam or seams running through the upper fraction of a mountain or ridge. There three types of mountaintop removal operations: (1) mountaintop removal with a variance from approximate original contour (AOC), (2) mines which remove all of the coal seam or seams in the upper fraction of a mountain but which return the land to AOC, and (3) steep-slope mines with an AOC variance. Under SMCRA, as well as both Federal and State regulations, all mines are required to return the mined land to AOC, unless the regulatory authorities, which, in Tennessee, are OSM, and the US Army Corps of Engineers, grant a variance. What is inadequately considered in the Draft PEIS is the role of the State of Tennessee in the proposed policies, guidance and coordinated agency decision-making process.

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The purpose of the Draft PEIS, according to the Notice of Intent published in the Federal Register on February 5, 1999, is

*"to consider developing agency policies, guidance, and coordinated agency decision-making process to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affect by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills."*

Does the Draft PEIS accomplish the full requirements and Notice of Intent pursuant to NEPA? It [the EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. [30 CFR Section 1502.1] Federal agencies are required to look at the "bigger picture" with any proposed federal action, such as described in the Notice of Intent of February 5, 1999. Other factors play a major concern with the proposed developing policies by EPA, OSM, FWS and COE. Surely Congress did not mandate a policy change to the Clean Water Act?

Has the Draft PEIS fully assessed and considered all NEPA required environmental, social, cultural, economic, and human impacts from the proposed federal action? SOCM believes that the Draft PEIS has only begun to address the full scope of environmental and human impacts. The Draft PEIS gives the impression that mountaintop mining and valley fills can be managed without harming the environment and the citizens of our Nation. The reality is that mountaintop mining and their domino cumulative impact does causes environmental and human impacts to the communities in the coalfields of our Nation. The Draft PEIS does not address these environmental and human impacts in depth. The Draft PEIS only addresses the "process to minimize the adverse environmental effects to waters of the United States." While the required NEPA process of a "hard-look" to consider the full scope of long-term cumulative impacts have been overshadowed by a "fast-food" approach to assess cumulative impacts, during a short three-year period, not only harms the environmental community, but it put the humans at risk to health and environment impacts. OSM-Knoxville Field Office took eight years (1992 to 2000) to assess a "Lands Unsuitable for Mining Petition (LUMP) for the Fall Creek Falls State Park and Natural Area in Van Buren and Bledsoe Counties, Tennessee. These two counties are part of the "Study Area" noted in the Draft PEIS. Yet, reviewers of the Draft PEIS must assume that federal agencies have compile a document in approximately three years which covers four states. The issue is to complex and needs further detail scientific evidence to fully evaluate potential impacts from "Mountaintop mining". The Draft PEIS only places a "standard" for which to measure impacts. You can not place a government standard on the loss of your home or the cultural history of a community.

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As stated by Kentuckians for the Commonwealth's Daymon Morgan, "*Once your old Kentucky home is gone, it is gone.*" No federal or state agencies can place a price tag on such a loss. This emotional statement reaches to the heart of the fundamental principles of citizens' rights under the Constitution and the guiding principles of NEPA. Citizens across our Nation are only asking that federal agencies protect their communities. These individual rights and guiding principles are what US soldiers are dying for even today in 2004.

The information in the Draft PEIS gives the reader the impression that program's improvements put in place by federal and state agencies since 1998 have solved all the problems associated with mountaintop mining and valley fills. Here lies the real problem with making decisions and evaluations without proven scientific evidence. Does the Draft EIS meet all statutory requirements, as required by Section 102(2)(c) of NEPA (30 CFR Section 1502.3)? The Draft PEIS data is a collection of information gathered during a three-year period from states which operated their own individual SMCRA programs in Virginia, West Virginia and Kentucky on mountaintop mining and valley fills operations. The Tennessee Federal Program submitted data specifically on cross-ridge mining, contour mining, auger mining and area mining operations. Some of these sites are known violators of SMCRA and Tennessee Water Quality Control regulations.

SOCM believes that the Draft PEIS should include all statutory requirements that should be analyzed pursuant to: on proposals (sec. 1508.23), for legislation (Sec. 1508.17), other major Federal actions (Sec. 1508.18), significantly (Sec. 1508.27), affecting (Secs. 1508.3 and 1508.8) and the quality of the human environment (Sec. 1508.14), regarding any new proposed policies by federal agencies.

The Draft PEIS's Tennessee data does not supply adequate data or impacts assessments specifically on "mountaintop removal mining" permits in Tennessee since OSM-Knoxville had not been issued any permits for mountaintop removal mining during the study period. The mixing of data from different types of surface coal mining operations does not address the "Notice of Intent" of February 5, 1999. Federal agencies cannot apply assessment of cumulative impacts from other types of surface coal mining operations to specifically evaluate the impacts from "mountaintop removal mining" operations. In the Draft PEIS, the term "mountaintop mining" is not defined in the Surface Mining Control and Reclamation Act of 1977. SOCM believes that the require regulation 30 CFR 1502.4(c)(3) has not been achieved in the proposed Draft PEIS. SOCM finds that no proven "new technologies" are available to date on research, development or demonstration programs to address the Tennessee Federal Program pursuant to the original intent of the Draft PEIS. The Study Area for Tennessee in the Draft PEIS does provide some data on unproven "new technologies" sites. Many of these sites in the "Study Area" of Tennessee are locations of past and ongoing surface coal mining operation's violations.

Does OSM-Knoxville currently use appropriate standards in evaluating whether a particular postmining land configuration constitutes a return to AOC? They are various characteristics of "land after mining" in terms of elevation changes, creation of valley fills, creation of level sections, and other general descriptive information. The issue is how any

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of those characteristics, either by themselves or in combination, may be used in determining if mountaintop mining in Kentucky, Virginia, and West Virginia has been achieved to meet regulations. In Tennessee, the situations where OSM-Knoxville has determined that a waiver from AOC requirements is necessary, has it required appropriate postmining land use in granting the waiver? Was this information factored into the Draft PEIS assessment?

While mountaintop removal mining and valley fills are emotional issues, the Draft PEIS must provide sufficient scientific evidence to conclude that different methods of mountaintop mining operations are an acceptable risk in Tennessee. Mountaintop mining operations raise a number of other complex issues and consequences that are partially or totally outside the confines of SMCRA. One of the issues that both OSM and other federal agencies are continuing to examine is the way mountaintop mining operations affect local stream through construction of valley fills. The matter of valley fills involves the overlapping jurisdiction of several federal agencies including OSM, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers. The Draft PEIS must consider how federal agencies will coordinate with individual state's agencies and regulations to address various issues that are associated with mountaintop mining and valley fills practices. These various issues consist of the NEPA's "hard-look" catalogues for specific impacts outside of the direct and indirect impacts to the environment. The Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sec. 1502.16) of the Draft PEIS should included information and analysis of environmental impacts of the proposal and the alternatives of direct, indirect and cumulative impacts.

Past litigation in the Draft PEIS "Study Areas" for Tennessee [see map, Attachment #1] should have raised serious questions about compliance with the Clean Water Act in connection with mountaintop mining and valley fills operations in the future. The Draft PEIS Study Areas noted mountaintop mining operations (pursuant to Draft PEIS definition) which resulted in the following lawsuits during the compiling of the Draft PEIS:

1. (see Attachment #2A): *Eastern Minerals Int'l v. The United States*, Supreme Court No. 01-1100 (2002).
2. (see Attachment #2B): *Eastern Minerals Int'l v. The United States* Fed Cl No. 99-5054, -5059 (November 19, 2001) which summarizes ( *Eastern Minerals Int'l v. The United States* 168 F. 3d 1322 (Fed. Cir. 1998) and ( *Eastern Minerals Int'l v. The United States*, 39 Fed. Cl 621,631 1997 [Eastern II] and ( *Eastern Minerals Int'l, Inc. v. The United States*, 36 Fed. Cl. 541, 552, 1996 [Eastern I]) and *Eastern Minerals Int'l v. The United States* Fed Cl filed Dec. 29, 1994).
3. (see Attachment 2C): *Cane Tennessee, Inc. and Colton, Inc. v. The United States*, Fed. Cl No. 96-237L Filed September 30, 1999).
4. (see Attachment 2D): *Rith Energy, Inc. v. The United States*, Supreme Court No. 01-1145 (2002).

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5. (see Attachment 2E): *Rith Energy, Inc. v. The United States*, Fed. CI No. 99-5153, Filed May 2, 2001.
6. (see Attachment 2F): *Rith Energy, Inc. v. The United States*, Fed. CI No. 92-480L, Filed June 25, 1999 and Motion for Reconsideration, Filed July 28, 1999 which summarizes *Rith Energy, Inc. v. The United States* (No. 89-1-PR, March 26, 1989) *Rith Energy, Inc. 111BLA 239, 244* (1989), *Rith Energy, Inc. v. The United States*, Filed November 22, 1989, *Rith Energy, Inc. v. The United States*, Filed January 25, 1989, *Rith Energy, Inc. v. The United States*, Filed August 31, 1988.
7. (see Attachment 2G: *Mountains Save Our Cumberland, Inc. v. Office Surface Mining Reclamation and Enforcement, and Skyline Coal Skyline*, NX-97-3-PR (1998).

The Draft PEIS fails to assess conflicts with other states agencies' and federal agencies' land use and environmental laws, regulations, and policies from mountaintop mining and valley fills operations. Are the proposed alternatives in the Draft PEIS in compliance with the State of Tennessee's laws and regulations? In order to provide an accurate picture of mountaintop mining and valley fills operations in Tennessee, the Draft PEIS readers would need to know the answer to this question. The data about the actual size of the valley fills created in connection with the mountaintop mining operations and valley fills should be factor into the evaluation. The Draft PEIS has omitted assessing limiting sizes of mining operation as an option to minimize impacts.

The draft PEIS fails to answer if mountaintop mining is an acceptable risk in Tennessee. All the "Study Areas" in Tennessee were either cross-ridge mining, contour mining, area mining or auger mining operations. These sites chosen for data have some of the worst surface coal mining violations in the history of the Tennessee Federal Program. [OSM-Knoxville Field Office NOV files] Skyline Coal Company stands as one of the worst surface coal mining site for violations. The data provided by OSM-Knoxville from the Skyline Coal Company should be question. The Draft PEIS fails to note the long history of problems of surface coal mining the toxic and acid mine drainage of the Sewanee coal seam. The Draft PEIS fails to note the lawsuits between OSM and SOCM in permitting the Big Brush Creek Mining Complex. The Draft PEIS fails to note other problem areas in the Sewanee coal seam such as; Eastern Minerals (Bledsoe County) v. Rith Energy (Bledsoe County) and Skyline Coal Company (Sequatchie Van Buren Counties). The bankrupt Horizon Natural Resources (former AEI Resources Holding, Inc.) and their associates companies in Tennessee have serious data accuracy questions. The Cumberland Coal Company's problems with recorded mining violations. [OSM-Knoxville Field Office Novs files] Yet, the Draft PEIS, "assumes that impacts in the study area would probably be at least as significant as impacts in other areas, and that the measures to address these impacts for the study area would be adequate for other areas as well." [page, PART I-3, PEIS] This leaves SOCM to question the valley fills data associated with these surface coal mining operations resulted in the loss and degradation of Tennessee streams, and that ARAP, NPDES and SMCRA permits were being improperly applied. And yet, the writers of the Draft PEIS give the readers the assumption that mountaintop

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mining and valley fills impacts can be "minimize" by state run programs in Kentucky, West Virginia, and Virginia. Yet, the Tennessee Federal Program can not "minimize" regular surface coal mining operation's impacts in Tennessee associated with known violator's surface coal mining operations.

The Draft PEIS "fast-food" approach of selective gathering and assessing of data for a short 3-year period is not scientifically sound. The Preliminary EIS of January 2000 raised a number of concerns with the long-term cumulative impacts from mountaintop mining that have been shadowed by the Draft PEIS of May, 2003. SOCM questions the reference data in the Draft PEIS, relating to Tennessee, it is not accurate up-to-date mountaintop mining data. Since the Tennessee Federal Program is administrated by OSM directly, it can not accurately represent a state run program such as Virginia, Kentucky and West Virginia. More complete data collection and analysis, and other actions, such as peer review, would aid to consider developing agency policies, guidance, and coordinated agency decision-making process to minimize the adverse environmental effect.

NEPA review sets forth a process designed to ensure that the environmental information is available to public officials and citizens before decisions are made. Since the release of the Draft PEIS, SOCM has not seen a printed public notice in any of the 22 county area of the Tennessee coalfields to let citizens know if the proposed federal action.

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There are still uncertainties about how to apply the AOC requirements in the Draft PEIS, and how broadly or narrowly the postmining land use limitations should be construed by federal agencies. These uncertainties change with each new administration in Washington, DC.

SOCM has concerns with the administration of various aspects of the mountaintop mining and valley fills program. Some of the issues have existed since the early days of the Tennessee Federal Program [49 FR 15496, 49 FR 38874], while other concerns related to the recent increase in the number and size of mountaintop mining permits that will effect the future decision-making under the Tennessee Federal program. Such decisions, must be made with the cooperation of local and state agencies, and have full public involvement.

The Draft PEIS should assess and analysis the federally operated Tennessee Federal Program's mountaintop mining and valley fills conflicts. The Tennessee Federal Program has a long history of problem areas: (1) public notice, (2) regular schedule meetings with the public, (3) outreach meetings in the coalfields of Tennessee, (4) public involvement with the SMCRA permitting process, (5) scoping public notices, (6) peer review process, (7) networking with all state agencies, (8) enforcement of SMCRA laws, (9) holding public hearings for incomplete SMCRA permits, (10) poor assessments of direct and indirect cumulative impacts at permit sites, (11) poor records of site inspections, (12) issuing permits at National Historic sites: "Trail of Tears", (13) delaying lands unsuitable of mining petitions, (14) blasting inspections and enforcement, (15) enforcing the Clean Water Act, (16) issuing fines for NOVS, (17) poor assessment of AMD impacts on aquatic life near SMCRA permit sites, (18) issuing poor water monitoring plans at SMCRA permit sites,



(19) poor assessment of land use during permit review, (20) bad blasting complaint process for citizens, (21) poor assessment of impacts to on-site and off site Threatened and Endangered Species during SMCRA permit application review, (22) poor pre-blasting survey process, (23) poor assessment of impacts to scenery and culturally significant landscapes, (24) staffing and funding problems, (25) poor coordinated assessment of economic impacts at county and state levels, (26) allowing mining in the old Spencer Artillery Range, (27) poor coordinating with county governments (county historians and civic leaders, Chambers of Commerce), (28) allowing poor toxic and acid material handling plans, (29) allowing permits in known toxic coal seams: the Sewanee coal seam, (30) allowing permits near state interstate highway routes, (31) poor assessments of impacts to wetlands, (32) poor assessment of habitat impacts, (33) poor assessment of direct and indirect impacts from deforestation, (34) no watershed approach assessment to reviewing proposed SMCRA permits, (35) poor mitigation assessments of proposed SMCRA permits, (36) no proactive AML program, (37) no karst system database, (38) no ground water assessment procedure, (39) poor procedures to report mining violations takes to much time, (41) poor bonding procedures, (41) poor record keeping of transfer and sale of mineral rights by coal companies, (42) poor civil penalties enforcement, and (42) outdated database.

#### "JOBS" versus "THE ENVIRONMENT" MYTH

The Draft PEIS fails to give an accurate assessment of job losses in the coal industry. As coal production rose 32 percent between 1987 to 1997, the coal industry recorded a 29 percent job loss during the same period. The truth is that some mountaintop mining operations reduces the total number of jobs such as operations that use more conventional methods. Less manpower operations is an economic reality in today's global economy.

What is not answered in the Draft PEIS is that economic impacts to coalfield counties after the closings of mining operations which is the true measurement of economic impacts to local, county and state economies. The Draft PEIS only provides short-term economic impacts. The Draft EIS fails to give economic long-range growth plans for each state: West Virginia, Kentucky, Virginia and Tennessee. Each state is working with individual federal and state agencies to develop key goals and strategies to improve and plan long-term jobs. The Draft PEIS fails to provide how federal agencies plans to off-set job losses to other industries that could be significantly effected in Tennessee by large mountaintop mining and valleys fills sites, such as recreational and tourism industries, hotel and motel industries, restaurant industries, Gasoline industry, Arts and Crafts industries, amusement park industries, fishing and hunting industries. *"Tourism is the second-largest industry in Tennessee, drawing more than 38 million visitors who spend approximately \$10 billion annually. Tourism in Tennessee generates as many as 176,000 jobs, which account for \$4.4 billion in wages."* [see Attachment #3, Bob Keast, Executive Director of Tennessee Association of Resorts, Marinas and Marine Dealers] Attachment 3(a) illustrates how individual counties in the coalfields of Tennessee depend on tourism to balance its local economy and tax revenues. The Draft PEIS fails to provide accurate assessment on

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economic impacts to local and state officials in recruiting new tourism businesses to locate in Tennessee.

#### STATE OF TENNESSEE ANTIDEGRADATION POLICY

The Draft PEIS fails to resolve the conflict between Tennessee's Antidegradation Statement in Chapter 1200-4-3-.06 of the Rules of the Tennessee Department of Environment and Conservation and the Tennessee Water Quality Control Board. The Draft PEIS must determine the direct and indirect impacts of mountaintop mining and valley fills so as to ensure that the preferred alternative will meet the Tennessee antidegradation requirements.

The Draft PEIS fails to determine direct and indirect cumulative impacts to State Parks, Natural Areas and Wildlife Management Areas located in the watersheds listed in the Tennessee "Study Area". Pursuant to Tennessee Antidegradation requirements, mountaintop mining and its associated valley fills would not be allowed to operate since degradation from upstream point source discharges or physical alteration would result. "Degradation" is defined as a lowering of water quality.

The Draft PEIS fails to assess Tennessee "High Quality Waters". Federal guidelines require "high quality" waters to include those, which meet or exceed standards. The Draft PEIS fails to assess the impacts on Tennessee's comprehensive policy document that follows the promulgation of the regulations. The Draft PEIS fails to analyze the impacts of mountaintop mining and valley fills upon Tennessee's antidegradation implementation process. What are the antidegradation procedures which must be developed in clearly articulated written procedures that outlines the process that will be used by federal agencies. What are the cumulative impacts upon scenic rivers, lakes and reservoirs in the coalfield counties of Tennessee?

"High Quality Waters are those that:

1. Provide habitat for ecologically significant populations of aquatic or semi-aquatic plants and animals (including those proposed or listed for formal state or federal status).
2. Provide special recreational opportunities.
3. Possess outstanding scenic or geologic values.
4. Where existing conditions exceed water quality standards.

These issues should have been assessed and analyses in the Draft PEIS relating to mountaintop mining and valley fills in Tennessee and its impacts upon the "Antidegradation" policy.

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### CONCERNS WITH THE DRAFT PEIS "STUDY AREA" DATA AND THE TENNESSEE FEDERAL PROGRAM AND THE AVS PROGRAM

The cumulative impact study areas in Tennessee consisted of surface coal mining sites. [see again, Attachment #1]. These sites received SMCRA permits between January 1992 to 2002. These sites were approved to use surface mining methods or a combination of surface and underground methods to extract coal. This data from the Tennessee Federal Program were used by OSM Pittsburgh Office to study cumulative impacts for the Draft PEIS along with data from individual state run programs in Kentucky, West Virginia and Virginia.

What is missing from the database information is

- The history of types of surface mining operations were used and the history of violation data from each site.
- Additional data characterizing violations would show a clearer picture and understanding of problems related to SMCRA permitting in Tennessee.
- Information from the AVS Federal database on mining operators at each Tennessee Study Areas.
- New geographical discoveries in Tennessee's coalfields are missing from the OSM's database. Additional discoveries of plants, animals and aquatic life is missing from the OSM's database.
- The OSM-Tennessee database does not show new state parks and natural areas designated by the State of Tennessee.
- The total numbers of NOV's from each of the "Study Area" site(s) are missing from the OSM's database. This important information of NOV's would show a clearer understanding of potential cumulative problems that could occur with mountaintop mining and valley fills. An example of one of the worst cases of degradation in Tennessee is the Big Brush Creek Complex of Skyline Coal Company owned by Addington Enterprises (now Horizon Natural Resources) in Van Buren and Sequatchie Counties, Tennessee.
- OSM-EIS-18, 3.2.2 RESERVES OF COAL IN TENNESSEE, pages 3-1 to 3-4 gives a clearer picture of the reserves of coal in Tennessee. Does the scope of the Draft PEIS go beyond the minimum recovery factor of measured coal seams? The potential cumulative impacts would vary from county to county in Tennessee due to the depth of each individual coal seam.
- OSM-EIS-18, 3.3 COAL MINING OPERATIONS, pages 3-6 to 3-10, addresses such operations as: 3.3.1 Underground coal mining, 3.3.2 Surface mining, 3.3.2.1 Area

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mining, 3.3.2.1 Dragline area mines, 3.3.2.1.2 Dozer-loader-truck area mines, 3.3.2.2 Contour mine, 3.3.2.3 Mountaintop removal, 3.3.2.4 Augering, and 3.3.3.1 Tipples, and 3.3.3.2 Preparation plants. Does the scope of the Draft PEIS cover all of the above operations?

- OSM-EIS-18, Figure 3-1, Regional map of the Tennessee bituminous coal field, page 3-12. The map shows individual counties. Does the Draft PEIS include data from ALL 22 counties?
- OSM-EIS-18, 3.5.1.1 GEOLOGY OF THE TENNESSEE BITUMINOUS COAL FIELD, page 3-13. Five regions of coal provinces are named: Cumberland Block Region, Wartburg Basin Region, the Northern Cumberland Plateau Region, Southern Cumberland Plateau Region and Walden Ridge Region. Does the Draft PEIS assessment data include all five regions? They are more than 25 named coal seams in the Cumberland Block Region, page 3-17. The Wartburg Basin Region has 16 commercial coal beds, page 3-18. The Northern Cumberland Plateau Region has 5 commercial seams and 15 named coal beds, page 3-19. The Southern Cumberland Plateau has 7 coal seams and 13 named coal beds, page 3-20. The Walden Ridge Region has 9 commercial seams and 13 named coal seams. Does the Draft PEIS assessment data include all five regions and their individual coal seams?
- OSM-EIS-18, 3.5.2.1 SURFACE WATER QUALITY, page 3-21. Abandoned and active mines exist in all five-coal regions. Does the Draft PEIS database assessment include the results from these abandoned and active mines? To fully assess the intent of the Draft PEIS, and address proposed policy changes, Federal agencies would need to know past mountaintop mining operations impacts in these regions.
- OSM-EIS-18, page 3-22, paragraph 2, "Problems associated with surface runoff are directly related to climate and precipitation as well as to topography and geology." Does the Draft PEIS address potential increases of these types of associated problems with mountaintop mining and valley fills?
- OSM-EIS-18, Figure 3-5, Wildlife Management areas within the adjacent to the Tennessee coalfields, as outlined on pages 3-60 of OSM-EIS-18. The information is outdated. Does the Draft PEIS show or listed updated sites that have been created over the past 18 years? Does the Draft PEIS evaluation includes these additional sites?
- OSM-EIS-18, 3.5.8 ECONOMIC CONDITIONS, pages 3-73 to 3-78, is outdated. Does the Draft PEIS include updated information?
- OSM-EIS-18, 3.5.9 POPULATION TRENDS, pages 3-78 to 80, is outdated. Does the Draft PEIS include the latest known data?
- OSM-EIS-18, 3.5.11 LAND USE Use, page 3-84, is outdated. Does the Draft PEIS include the latest known state and community growth plan data?

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- OSM-EIS-18, 3.5.12 TRANSPORTATION, pages 3-84 to 3-86, is outdated. Does the Draft PEIS include the latest known data on current and future transportation plans?

The Draft PEIS is in conflict with the purpose of OSM-EIS-18 which in part is to analyze the cumulative impacts and consequences of decisions by OSM on SMCRA permit applications under the Tennessee Federal Program. These assessments would address how OSM and the SMCRA permit applicant plan to meet compliance of adequacy of information to allow OSM to comply with the National Environmental Policy Act of 1969 (NEPA) for any future proposed SMCRA permits. [30 CFR 942.773(b)(6) and 49 FR 38892, Oct. 1, 1984 and 65 FR 79582, 79672, Dec. 19, 2000].

The Draft PEIS does not contain data or information on database information from the AVS program. What is the AVS history of individual study areas in the Draft PEIS. If no AVS information is available or operators have no past AVS history then the Draft PEIS should state such information for reviewers.

The Draft PEIS does not provide information on NOV history of the Tennessee Study Areas. Reviewers are to assume the Tennessee Study Areas never received any NOV during their operations. ALL, factual data and history should be included in the Draft PEIS about "Study Areas". The proposed federal action requires a "hard look" at all available information. Any well-written Programmatic DEIS would have this information for reviewers. Both the "GOOD" and the "BAD" of mountaintop mining and valley fills should be within the Draft PEIS pages. Federal Agencies should be free from bias and impartial to the either side.

The Draft PEIS fails to provide the full impacts to the Tennessee Federal Program of the proposed federal agencies action. In fact, no in depth assessment of impacts to the Tennessee Federal Program is within the Draft PEIS. Specific sections should be added to the Draft PEIS that analyses the full scope of administrative impacts, costs and changes to the Tennessee Federal Program. Each section of 30 CFR Parts 942.700 – 942.846 (updated April 2, 2001) should be addressed in the Draft PEIS.

#### FORMAT OF DRAFT PEIS

Tennessee reviewers do not have the necessary time to review and analyze the full scope of administrative changes to the Tennessee Federal Program due to the format of the Draft PEIS. It took federal agencies four years to create the Draft PEIS. Individual Tennessee reviewers and Tennessee State agencies can not fully evaluate the Draft PEIS in a few months. Fragments of data and assessment information of the Tennessee Study Areas and the Tennessee Federal Program are in the many pages of the Draft PEIS. The extensive range and scope of the Tennessee Federal Program requires a broadcloth review by Tennesseans, as to the full impacts of the proposed federal action. The Draft PEIS is more of a bronco approach to assessing and evaluating the Tennessee Federal Program.

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#### ADMINISTRATIVE COSTS

Not only should environmental concerns be address in the Draft PEIS, but also administrative impacts and costs should be included within the Draft PEIS. The number of personnel employees to oversee the proposed actions, as the preferred alternative should be included in the Draft PEIS documents.

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#### TRAVEL INDUSTRY AND TOURISM IMPACTS

The Draft PEIS fails to provide detailed analyses on the direct and indirect impacts to the Tennessee tourism economy from mountaintop mining and valley fills. In a speech on Friday, July 6, 2003 in Chattanooga, Tennessee Governor Phil Bredesen pledges his support for tourism. "A \$10.4 billion business, nearly 38 million visitors annually and 177,000 jobs. Those numbers are huge. Tourism is, without a doubt, a cornerstone of our state's economy." [see Attachment #4, TENNESSEAN, Saturday July 7, 2003, "GOVERNOR BACKS CREDIT CARD CHECK" by Bill Poovey, AP] and [see Attachment #5, "BREDESEN OUTLINES PLANS TO EXPEND TOURISM ECONOMY", by Bob Keast, Executive Director of Tennessee Association of Resorts, Marinas and Marine Dealers]

Today, the travel and tourism industry that has developed to serve the traveler contributes enormously to the U.S. economy. In 2000, direct traveler spending in the United States by domestic and international travelers reached \$563.5 billion dollars, 5.7 percent of the nation's gross domestic product. This activity generated \$100.2 billion in tax revenue for federal, state and local governments. [see Attachment #6, THE ECONOMIC IMPACT OF TRAVEL ON TENNESSEE COUNTIES 2000, by the Tennessee Department of Tourist Development.] The Draft PEIS fails to assess and analyze the affected environment (CFR 1502.15) and the environmental consequences (CFR 1502.16) of mountaintop mining and valley fills on Tennessee's Travel industry and Tourism and the loss of tax revenues for Tennessee and the coalfield counties' local governments that have gone to great lengths to develop new markets for domestic and international travelers. Mountaintop mining and valley fills sites are not vacation destinations for tourists that visit Tennessee.

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Travelers in Tennessee produce "secondary" impacts over and above that of their original expenditures. These secondary outputs (sales) and earnings (wage and salary income) arise from "direct" and "indirect" spending. The Draft PEIS' economic sections and assessments do not address ANY of the above travel industry and Tourism impacts from mountaintop mining and valley fills in the coalfield counties of Tennessee.

The Draft PEIS fails to assess any significant cumulative impacts to Tennessee's business and economic outlook. In February 2003, AN ECONOMIC REPORT TO THE GOVERNOR OF THE STATE OF TENNESSEE by UT's Center for Business and Economic Research [see Attachment #7] provide a long-term forecast for Tennessee and projected trends. Mountaintop mining and valley fills are NOT noted in the document, or

their potential risks to Tennessee's economy. The Draft PEIS fails to give an adequate economic impact statement and to discuss Tennessee Economic trends and risk impacts from mountaintop mining and valley fills. The February 2003 report noted mining data on pages Appendix A, QF5, QF8, QF11, QF12, QF13, QF14, AF5, AF8, AF9, AF13, AF16, and pages Appendix B, QH5, QH8, QH11, QH12, QH13, QH14, AH5, AH8, AH9, AH13, AH16. The Spring 2002, TENNESSEE BUSINESS AND ECONOMIC OUTLOOK by UT's Center for Business and Economic Research [see Attachment #8] provides projected growth assessment for Tennessee's economy. The mining industry data (pages, 21, 22, 23, 24, 37, 40, 43, 44, 45, and 46) shows mining has a small economic impact on Tennessee's economy, as compare to all other businesses in Tennessee. Yet, the economic draw to travel industry and tourism sites provides long-term revenues and jobs for citizens in the coalfield counties of Tennessee. The Fall 2002, TENNESSEE BUSINESS AND ECONOMIC OUTLOOK by UT's Center for Business and Economic Research [see Attachment #9] provide additional data on pages 18 and 44 which shows more projected assessments of mining in Tennessee. In 2001, AN ANALYSIS OF AN ECONOMIC REPORT TO THE GOVERNOR OF THE STATE OF TENNESSEE, A Report to the State Funding Board, Office of Research and Education Accountability, Comptroller of the Treasury, [see Attachment #10] shows impacts on the Tennessee State budget from tax revenues and predicted levels of economic growth. The report shows no evidence that mountaintop mining and valley fills will bring an economic increase into Tennessee. The TENNESSEE ECONOMIC OVERVIEW [see Attachment #11] of October 2001 showing the index as of January 2002 fails to indicate ANY rise in revenues from mountaintop mining and valley fills. In TENNESSEE POLICY RESEARCH BRIEF, Vol. 1, No21, November 2001, GENERAL ECONOMIC CHARACTERISTICS IN TENNESSEE, Examining Changes in Labor Market Conditions and Income Levels, 1990-2000 by UT's Center for Business and Economic Research clearly shows that Tennessee's labor force is developing to meet current demands for skilled jobs. (see Attachment #12) The mining industry labor force has decreased over the past ten years. (see Attachment #13) Furthermore, misleading data are associated with the Draft PEIS. The Tennessee mining industry data presented in the Draft PEIS includes information on crushed stone mining, zinc mining, Portland cement mining and construction sand mining and gravel mining. Inclusion of data for non-coal mining industries is irrelevant and does not fulfill the primary objectives of this Draft PEIS. The Draft PEIS should be revised to just show data of specific surface coal mining operations and the total number employment data. See Attachment Section for supplement information on brochures, Attachment #31)

#### IMPACTS ON TENNESSEE'S ART INDUSTRY ECONOMY

The Tennessee Arts economy provides \$143.8 million into the Tennessee economy. 4,000 jobs are dependent on the nonprofit arts industry in Tennessee, and \$134 million in income was generated by nonprofit arts activities in Tennessee. [see Attachment #14] The Draft PEIS fails to provide assessment and analysis on potential impacts to East Tennessee Arts Industry and activities.

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#### TENNESSEE DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT IMPACTS

SOCM has expressed concerns with the Tennessee Department of Economic Community Development, Director of Special Projects, Wilton Burnett, Jr. on the significant interdepartmental issues including state and local coordination on environmental and economic development impacts as well as a possible need to consider the impacts of potential future large-scale coal surface mining operations. [see Attachment #15] The Draft PEIS fails to analyze economic and community growth in the 22 Tennessee coalfield counties, pursuant to Draft PEIS Part II, page A-8, Part III, page Q-1 to Q-14, Part III, pages R-3 to R-6, Part III, page T-2 and Part IV, pages I-1 to I-23. The Draft PEIS should give reviewers of the above sections of the Draft PEIS a clearer assessment and evaluation of potential significant impacts and proposed alternatives. The Draft PEIS only supplies data about the coal industry's temporary economic impacts in communities. It fails to give economic impacts data for the period after the coal industries leaves a community and moves away. These after-mining economic impacts have historically left local governments, civic leaders, and local businesses facing dramatic shortfalls in resources needed to maintain individual communities and counties. These types of "driftwood-economy" communities are historically cast aside by coal industries. The Draft PEIS should assessed and evaluated the full impacts of potential future large scale coal surface mining operations as suggested by Mr. Burnett above pursuant to the NEPA process.

The Draft PEIS is inadequate because:

- It fails to provide assessment of existing economic base in each of the 22 county of the Tennessee coalfield and assess the impact of mountaintop mining and valley fills upon the existing economic base.
- The Draft PEIS economic sections fail to provide individual assessments of all 22 counties in the Tennessee coalfields. In fact, many, if not all, 22 counties local political and civic and business leaders are unaware of the current proposed Draft PEIS.
- It fails to provide area development resources availability and quality and the impacts of mountaintop mining and valley fills upon these resources.
- It fails to provide assessment of impacts of mountaintop mining and valley fills to state and local government's tax base.
- It fails to provide assessment of impacts of mountaintop mining and valley fills to economic development plans and strategies to target and guide growth.
- It fails to provide assessment of impacts on business attitude toward growth and development by local leaders and citizens.
- The Draft PEIS fails to seek direct input from local county governments on economic growth plans and strategies and the impacts that mountaintop mining and valley fills projects would have on these plans and strategies. And, to provide in the Draft PEIS proposed Alternatives Section ways to offset or "minimize" these impacts.

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**U.S. FISH AND WILDLIFE SERVICE  
STRATEGIES PLAN FOR CONSERVATION  
OF FISH AND WILDLIFE SERVICE TRUST RESOURCES  
IN THE LOWER TENNESSEE-CUMBERLAND ECOSYSTEM  
DRAFT PEIS IMPACTS**

The Draft PEIS fails to address ANY potential significant impacts of mountaintop mining and valley fills with the U.S. Fish and Wildlife Service *Strategies Plan for Conservation of Fish and Wildlife Service Trust Resources in the Lower-Tennessee-Cumberland Ecosystem*. [see Attachment #16] A number of Tennessee's coalfield counties lie within this ecosystem. Public Land use of such areas as the Big South Fork National River and Recreation Area (108,000) acres are significant concerns to Tennesseans. The Draft PEIS should be revised to address ANY conflicts between the proposed alternatives and U.S. Fish and Wildlife Service's Goals, Objectives and Strategies within the FWS document.

**CONFLICTS BETWEEN U.S. ARMY CORPS OF ENGINEERS  
U.S. FISH AND WILDLIFE SERVICE  
AND OFFICE OF SURFACE MINING OFFICE  
NWP PROGRAM**

In a memorandum dated 9/21/2001, U.S. Fish and Wildlife Service expressed major concerns with proposed changes to the Corps of Engineers nationwide permit program (NWP). [see Attachment #17] The draft Programmatic Environment Impact Statement for the Nationwide Permit Program released by the Corps on July 31, 2001, identified numerous deficiencies concerning the administration of the program, including inadequate record keeping and data entry, lack of mitigation compliance efforts, poor enforcement and failure of any meaningful attempts to quantify and assess the ecological effects of the nationwide permit program on the environment. [U.S. Fish and Wildlife Service Memorandum, comment page 1] The Draft PEIS does not submit how OSM, COE, EPA and the U.S. Fish and Wildlife Service has reached a programmatic agreement, if any, addressing these major concerns.

**Specific cites are major concerns with OSM's NWP and surface coal mining activities not analyzed in the Draft PEIS:**

FWS' comments page 1 cites:

"The Service has determined that surface coal mines authorized under NWP 21 often result in tremendous destruction of aquatic and terrestrial habitats, and do not meet the nationwide permit standard of minimal impacts. Data collected by the Corps for calendar year 2000 shows that NWP 21 was used to authorize 306 projects that collectively destroyed almost 14,000 acres of aquatic habitat, and nearly 88 miles of stream channels. The average impact per project under NWP 21 was 45.4 acres of wetlands, and 1505 linear feet of stream channel. To date, the Corps has not completed studies to quantify or assess the effects of this permit on the Nation's natural resources, and therefore has no

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scientific basis to assert that the permit will cause only minimal individual and cumulative impacts on the environment. Data gathered for the Corps/EPA draft EIS for mountaintop mining shows that the construction of valley fills has not been authorized on 583 square miles of the Appalachian region; this figure does not take into account the acreage extent of the coal mines that utilize the valley fills."

FWS' comments pages 6 to 9:

- The Service has determined that surface coal mines often adversely affect large areas of upland and wetland habitat, and in general, do not meet the standard of having "no more than minimal" impacts on the environment.
- We recommend that use of this permit be suspended, and further recommend that the Corps commit to completing peer-reviewed scientific studies analyzing the effect of this permit on the environment.
- The Service believes that these losses do not represent a "minimal impact" on the environment.
- Furthermore, none of the Corps districts that use this permit have conducted a cumulative effect analysis of the use of this permit on the environment.
- The large average wetland and stream losses, coupled with the lack of knowledge regarding the effects of these permitted losses on the environment, demonstrates that the Corps has insufficient basis to declare that this permit has only minimal individual and cumulative effects.
- The individual and cumulative impacts on both aquatic and terrestrial ecosystems caused by mining projects authorized in the Appalachians via this nationwide permit are unprecedented.
- The Service estimates that over 900 miles of streams have already been filled.
- Information compiled by researchers in aquatic ecology has documented that the first and second order streams being destroyed via NWP 21 are critical to the proper functioning of downstream aquatic ecosystems, including fisheries.
- NWP 21 authorization may affect 50 federally listed threatened or endangered species, including 7 fish and 25 mussel species.
- In addition, terrestrial species such as the Indiana bat and forest interior migratory birds are also adversely affected through the loss forest habitat caused by the coal mines authorized under NWP 21.

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- Neither the notice of intent nor the July 31, 2001, draft PEIS provide a detailed description of the kinds of habitat losses associated with the issuance of individual section 404 permits.
- The aquatic habitat losses associated with the NWP 21 have far exceeded the Corps' predictions.
- The acreage impacts from NWP 21 accounted for 71 percent of all NWP impacts in calendar year 2000.
- Currently, NWP 21 does not have any upper limit on the amount of aquatic resources that may be impacted by the authorized project, and is therefore out of line with the acreage limits adopted for many other nationwide permits.
- We believe that the text of the nationwide permit should be expanded to incorporate more complete guidance to the District Engineer that describes how the determination of minimal effects should be conducted, and if feasible, the level of environmental impacts that would indicate that the upper threshold of "no more than minimal" impacts has been reached.
- "the need to carefully evaluate and closely monitor the effects that the use of NWP 21 permit has on the aquatic environment, particularly stream channels and riparian corridors.
- "we believe that coal mining projects authorized by NWP 21 routinely violate General Condition 21 of the NWP program."
- "The Corps of Engineers' 404 permit review will address the direct and indirect effects to the aquatic environment from the regulated fill."
- The Corps should properly be examined the effects of the authorized project on the entire mining site, rather than merely examining the direct and indirect effects of the footprint of the fill in jurisdictional waters of the United States.

The Draft PEIS for mountaintop mining and valley fills should specifically document that all of the above major concerns of the US Fish and Wildlife Service with mountaintop mining and valley fills activities have been resolved by federal agencies prior to the release of the Final PEIS. More detail assessment pursuant to Tennessee coalfields by the Cookeville, Tennessee office of US Fish and Wildlife Service should be implemented into the Draft PEIS.

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**CONCERNS WITH EPA AND CORPS  
PROPOSED REVISIONS  
TO THE CLEAN WATER ACT REGULATORY DEFINITIONS  
65 FEDERAL REGISTER 21292**

In July 16, 2000, SOCM submitted comments of concerns with the Corps and EPA proposed revisions. [see Attachment #18]. As of December 2003, SOCM has not received any reply addressing our concerns. The Draft PEIS fails to note how EPA and the Corps have resolved citizens concerns, specifically with mountaintop mining and valley fills. The range of alternatives in the Draft PEIS fails to explore different intensities and quantities of mountaintop mining and valley fills and its relationship with 65 FR 21292.

**PROGRAMMATIC AGREEMENT  
AMONG THE FEDERAL HIGHWAY ADMINISTRATION  
THE NATIONAL PARK SERVICE  
TENNESSEE STATE HISTORIC PRESERVATION OFFICE  
TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION  
THE EASTERN BAND OF CHEROKEE INDIANS (EBCI)  
THE CHEROKEE NATION OF OKLAHOMA  
THE CHICKASAW NATION (CN)  
THE CHOCTAW NATION OF OKLAHOMA  
THE SEMINOLE NATION OF OKLAHOMA (DSNO)  
THE CUMBERLAND TRAIL CONFERENCE  
REGARDING IMPLEMENTATION OF THE  
CUMBERLAND TRAIL TENNESSEE STATE PARK  
[see Attachment #19]**

The Draft PEIS fails to assess and evaluate ANY potential conflicts with mountaintop mining and valley fills and the Programmatic Agreement between the Federal Highway Administration and the above organizations and Tennessee Department of Environment and Conservation (TDEC) and Tennessee State Historic Preservation Office. The Cumberland Trail state Park is located in Anderson, Bledsoe, Campbell, Claiborne, Cumberland, Hamilton, Marion, Morgan, Rhea, Sequatchie and Scott Counties, Tennessee. The development of the Cumberland Trail State Park is a major recreational land use project in Tennessee. The Draft PEIS fails to provide analyses of alternatives to minimize potential impacts to the above Programmatic Agreement.

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**TRAIL OF TEARS NATIONAL HISTORIC TRAIL  
DRAFT COMPREHENSIVE INTERPRETIVE PLAN IMPACTS**

The Draft PEIS does not assess significant impacts of mountaintop mining and valley fills to the Trail of Tears National Historic Trail in Tennessee. [see Attachment #20]

### TENNESSEE PARKS AND GREENWAYS FOUNDATION STRATEGIES CONFLICTS WITH DRAFT PEIS

The proposed Draft EIS fails to provide assessment and evaluations of alternatives to off set conflicts with TPGF's strategies: (1) actively pursue and acquire lands for public use, (2) offer small grants to others to create connections, (3) work with private landowners and accept conservation easements, and (4) conduct educational sessions to stimulate conservation initiatives by others. [see Attachment #21]

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### RARE SPECIES IN THE 22 COALFIELD COUNTIES OF TENNESSEE

The Draft PEIS does not provide assessment or analyses data on alternatives and efforts to minimize potential impacts to rare species found in the coalfield counties in Tennessee. [see Attachment #22] The lack of complete assessment and analysis of the significant risk factors posed by mountaintop mining and valley fills and mountaintop removal and cross ridge mining operations impacts to rare species and their habitats in Tennessee's coalfield watersheds leaves the Draft PEIS Section III and IV and the Draft PEIS Appendix F (see Attachment 22 A) fails adequately assess Tennessee's Rare species that are listed by the Tennessee Division of Natural Heritage.

Based on our review of positions published by the Tennessee Natural Heritage (TNH), Tennessee Wildlife Resource Agency (TWRA), and U.S. Fish and Wildlife Service Tennessee/Kentucky Field Office (FWS), the Draft PEIS descriptions of ecological resources, including Federally threatened and endangered species are not comprehensive and do not reflect the current knowledge of ecological resources present in the 22 coalfield counties of Tennessee. The proposed Programmatic Environmental Impact Statement does not reflect past U.S. Fish and Wildlife Service consultations for a number of OSM, COE and DOE projects in the 22 coalfield region in Tennessee. Examples include the NEPA Programmatic Environmental Assessment (EA) for the U.S. Department of Energy, Oak Ridge Operations Implementation of a Comprehensive Management Program for the Storage, Transportation, and Disposition of Potentially Re-use Uranium Materials (DOE-EA-1393), The Office of Surface Mining Reclamation and Enforcement's individual EISs for Frozen Head State Park and Natural Area, Fall Creek Falls State Park and Natural Area, North Chickamauga, Rock Creek and Fern Lake, and U.S. Army Corps of Engineers' Spencer Artillery Range and the National Historic Trail of Tears Historical Trail projects. The Draft PEIS fails to assess, analyze and submit alternatives to minimize direct and indirect cumulative impacts to rare species and their habitats. It is important that the Draft PEIS answer the concerns surrounding significant impacts to intermittent and perennial streams.

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### TENNESSEE'S BIOASSESSMENT PROGRAM

The Draft PEIS fails to assess potential impacts to the State of Tennessee's Bioassessment Program. [see Attachment #23] The Tennessee Division of Water Pollution Control has an extensive bioassessment program that has not been addressed in the Draft PEIS.

### APPLICANT VIOLATOR SYSTEM (AVS)

The Draft PEIS fails to address any potential impacts to the AVS program from the proposed federal action. How will the proposed changes impact the AVS program? (see Attachment #24)

### TENNESSEE AML PROGRAM

The Draft PEIS fails to identify and assess any significant impacts to SOCM and Governor Bredesen joint efforts to address the Abandoned Mine Lands problem in Tennessee. (see Attachment #25)

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### TENNESSEE RESTOCKING ELK PROGRAM

The Draft PEIS fails to address in detail how the proposed federal action will impact Tennessee efforts to restock eastern Tennessee with Elk. (see Attachment #26)

### TENNESSEE FEDERAL PRPROGRAM (OSM) REFORESTATION AND WILDLIFE HABITAT ENHANCEMENT INITIATIVE

The Draft PEIS fails to address any significant impacts to the OSM's Reforestation and Wildlife Habitat Enhancement Initiative under the Tennessee Federal Program. (see Attachment #27)

### DRAFT PEIS APPENDIX C CONCERNS

The Draft PEIS Regional Setting Supporting information (see Attachment #28) for Tennessee does not use up-to-date information on the regional changes since 1985. The Tennessee Division of Groundwater programs and regulations are not address. It is important to address concerns raised regarding any Programmatic EIS approval by federal agencies that do not look at impact assessment of mountaintop mining and valley fills and Mountaintop Removal mining and Cross Ridge Mining in the Tennessee coalfields. "Mountaintop Removal Mining: An Environmental Impact Assessment (EIA) Scoping Exercise and Impact Assessment of Mining Activities on Aquatic Resources. By Jeff Lee Hansbarger. (see Attachment #29)

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### IMPACTS TO MET TENNESSEE'S STANDARDS FOR DRINKING WATER AND SURFACE WATER

The State of Tennessee's Controller of the Treasury, Division of State Audit issued a Performance Audit on "Water Quality" on May 2001. The Draft Programmatic EIS fails to provide any review agreement with the State of Tennessee and the other federal agencies to assess the impacts of the proposed federal action on Tennessee's availability to meet its high water quality standards. (see Attachment #30) Tennessee Division of Water Pollution Control has invested a large amount of its budget's dollars and employee's time to develop a waste water pollution NPDES permit scheme to meet federal standards.

The Draft PEIS fails to assess how federal agencies and the State of Tennessee will be meet the high standards within the Tennessee Safe Drinking Water Act of 1983. The Draft PEIS does not provide any documentation from the Tennessee Division of Groundwater Protection, the Division of Groundwater Protection, the Division of Water Supply, the U.S. Army Corps of Engineers – Nashville District and EPA Region 4 office on potential mountaintop mining, mountaintop removal mining and cross ridge mining to Tennessee's water quality programs.

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### SOCM's SPECIFIC CONCERNS WITHIN THE DRAFT PEIS

#### DRAFT PEIS, PART I, PURPOSE AND NEED, pages I-1 to I-21

#### COMMENTS:

The purpose of this EIS is:

*"to consider developing agency policies, guidance, and coordinated agency decision-making process to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected the size and location of excess spoil sites in valley fills." [64 FR 5778]*

This a programmatic EIS, according to federal regulations (40 CFR 1502.4(b) ), preparation of a programmatic EIS serves as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographic area (46 CFR 18026, 51 FR 15618). A programmatic EIS facilitates tiering to an impact assessment of narrower scope to eliminate repetitive discussions of the same issues (30 CFR 1500.4(l)).

The Draft PEIS should state:

- How did federal agencies' policies, guidance, and decision making process work in Tennessee prior to the December 1998 settlement agreement?
- The outcome of the developing agency policies?
- How each federal agency will coordinate to achieve developing policies?
- How successful will be the developing agency policies?
- Describe the successes and challenges developing such agency policies?
- Describe key lessons learned?
- How federal agencies short-term outcomes affect the long-term goals identified in the Draft PEIS?
- How federal agencies will define and measure success of proposed developing policies?
- How federal agencies will monitor the long-term results of proposed developing policies?
- How federal agencies will use and share the results of proposed developing policies, internally and externally?
- How will federal agencies improve its process in the future?

Pursuant to the *Tennessee Water Quality Control Act of 1977* and the *Federal Clean Water Act*, and appropriate Federal and state regulations, SOCM views the Draft PEIS proposed Alternatives (all three) to consider new or revised program guidance, policies, or regulations to minimize, to the maximum extent practicable, and the adverse environmental effects of mountaintop mining/valley fills operations will harm and put at risk the human environment in Tennessee's watersheds. Pursuant to the Federal Register Notice of February 5, 1999, no public scoping hearings have been conducted in Tennessee, no public meetings have been conducted in Tennessee, and no meetings with citizens groups have been conducted in Tennessee to address any proposals relating to the Draft PEIS for mountaintop mining and valley fills. However the Draft EIS case "Study Area" shows that a "closed circle" of OSM-Knoxville Staff and TDEC's Environmental Policy Office have exchanged communications about the Draft PEIS. This lack of the NEPA scoping process (Sec 1501.7) voids the creditability and accuracy of the Tennessee's data used for the Draft PEIS.

The proposed Draft PEIS fails to consider its impacts on the watersheds located in the Tennessee coalfields. The proposed Draft PEIS will have significant impacts on the

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classified uses of the receiving waters and contain limitations on the amount of pollutant discharges and/or other conditions and will harm the human environment in the Appalachian study area. The Draft PEIS fails to address its impacts on TDEC's watershed management approach programs. The watershed approach is TDEC's key program at restoring water quality to the state's impaired waters.

While Tennessee's water resources are clean enough for most designated uses, there are some significantly impaired rivers and streams in the coalfields of Tennessee. The Draft PEIS fails to consider its long-term cumulative impacts of mountaintop mining upon these rivers and streams. TDEC's watershed approach programs considers the entire river basins of the coalfields of Tennessee. While the Draft PEIS addresses only the acreage surrounding a mountaintop mining sites, it fails to gather and document data on impacts on the complete watershed.

Much of the Draft PEIS sections are written in terms that the average citizens can not understand. The scientific terminology of mountaintop mining makes it hard for citizens to fully understand the terms and concepts with the Draft PEIS. SOCM finds that many of the graphs and other figures are not clear and understandable to the reader.

The Tennessee Federal Program is the only such federal program in Appalachia. Tennessee was the only state represented in the Draft PEIS that was regulated by OSM, NPDES and ARAP permits are regulated by the Tennessee Division of Water Pollution Control – Mining Section in Knoxville, Tennessee. The Draft PEIS is unclear as to Tennessee State agencies' roles if any alternatives to existing regulatory provisions and procedures are approval.

#### **PART I. PURPOSE AND NEED, Section E. STUDY AREA, page I-5**

##### **COMMENTS:**

Complete Tennessee Study Area data are missing from the Draft PEIS. The lack of complete information on the Study Area leaves the reader(s) to question if the sections of the Draft PEIS: Part II. Alternatives, and Part III. Affected Environment and Consequences of MTM/VF, and Part IV. Environmental Consequences of the Alternatives Analyzed are accurate and credible in assessing the potential significant cumulative impacts in Tennessee from mountaintop mining and valley fills.

#### **PART I. PURPOSE AND NEED, Section G. SCOPING AND PUBLIC INVOLVMENT, pages I-11 to I-12.**

##### **COMMENTS:**

SOCM finds that the general public in Tennessee is unaware of the proposed federal action and the Draft PEIS comment period due to multiple failures by the Department of the Interior to inform the public of this impending federal action. Neither OSM-Knoxville

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nor other federal agencies had any scoping hearings in Tennessee. Neither OSM-Knoxville nor other federal agencies have held any public meetings to discuss the proposed federal action. Neither has there been sufficient communication through established local and state media. SOCM finds that some Tennessee State agencies do not even know about the proposed federal action. SOCM finds that some counties are unaware of the proposed federal action. SOCM finds that the Draft PEIS does not listed all state and county government officials that should have been contacted for scoping input prior to the released of the Draft PEIS. In fact, 11 of the 22 counties have not been sent copies of the Draft PEIS. Overton County Library has not received a copy of the Draft PEIS. White, Warren, Van Buren, Hamilton, Franklin, Coffee, Rhea, Roane, Pickett, and Putnam counties have not received a copy of the Draft PEIS. SOCM finds that county's Department of Environment and Conservation, usually the office of county executives, have not been notified about the Draft PEIS. This lack of communication with the directly affected public does not meet basic NEPA requirements.

#### **DRAFT PEIS, PART I, PURPOSE AND NEED, Section I (GX1)(a) Public Meetings and (1)(b) - Meeting with Citizen Groups, page I-12:**

##### **COMMENTS:**

The Draft PEIS does not include concerns from Tennessee stakeholders. In fact, SOCM cannot find any records of meetings in Tennessee, or out reach meetings, conferences, informal hearings, or letters from federal agencies: EPA, OSM-Knoxville Field Office, FWS, or COE seeking input on the proposed mountaintop mining and valley fills Draft PEIS.

EPA, OSM, FWS and COE have not complied with NEPA requirements to seek scoping information or input from Tennessee's stakeholders. The general public has not seen any information from the media, local and state political leaders, the offices of US Senators and Representatives, or the Governor's office on the proposed federal action. Stakeholders are individuals and organizations that have an interest in identifying water quality problems and in monitoring the effectiveness of these proposed solutions over time as it relates to mountaintop mining and valley fills. 10 of the 22 coalfield counties in Tennessee have not received a copy of proposed Draft PEIS. The make up the Programmatic EIS review committee should consist of:

Ecologist  
Physicist  
Historians  
Archaeologist  
Environmental lawyers  
Environmental chemist  
Wildlife botanist  
Hydrologist  
Socialist  
Environmental economist

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Marine scientist  
Health expert  
Geologist  
Environmental engineer

Missing from the Draft PEIS are such Tennessee stakeholders as: [not identified in the Draft PEIS]

- Individuals citizens who live in the coalfields of Tennessee.
- Municipal and county governments.
- Local councils of governments.
- Local soil and water conservation commissions or districts.
- County boards of commissioners.
- Chambers of Commerce organizations.
- Local and national citizens action groups.
- Local industries.
- Water suppliers.
- State ground water agency.
- Native American groups.
- Local Electric Cooperatives.
- Friends groups.
- Tennessee Wildlife Resource Foundation.
- Tennessee Wildlife Resource Agency.
- County Historical Societies.
- Tennessee fisheries.
- Recreational Clubs.
- Wildflowers Clubs.
- Bird Watchers organizations.
- Statewide Biking Clubs.
- Statewide Fishing Groups.
- Statewide Hunting Clubs.
- Ducks Unlimited organization.
- Tennessee Rivers organizations.
- Tennessee Department of Tourism.
- Tennessee Department of Air Pollution.
- Tennessee Department of Agriculture.
- Tennessee Arts Commission.
- Tennessee Department of Economic and Community Development.
- Tennessee State Board of Education.
- Tennessee Department of Forestry.
- Tennessee Emergency Communication Board.
- Tennessee Emergency Management Agency. (TEMA)
- Tennessee Board of Equalization.
- Tennessee Film, Music and Entertainment Commission.

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- Tennessee Fire Service and Codes Enforcement Academy.
- Tennessee Geographic Information System (GIS).
- Tennessee Department of Health.
- Tennessee Historical Commission.
- Tennessee Office of Homeland Security.
- Tennessee Human Services.
- Tennessee Department of Labor and Workforce Development.
- Tennessee Department of Solid Waste.
- Tennessee Department of State Parks and Natural Areas.
- Tennessee Wildlife Management Area officials.
- Tennessee United States Senators and Representatives.
- Individual coalfield counties' Department of Environment and Conservation, usually located in the County Executive's office.
- Individual statewide organizations: SOCM, TEC, TCWP, TCWN, TWRA, FFA, etc.

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The Draft PEIS should address the development of a programmatic process designed to actively and meaningfully obtain public input on the content and nature of the data and analyses necessary to define alternatives at the program level and to identify potential impacts to the physical and human environment. The Draft PEIS does not present procedures to address programmatic process with current state and federal mountaintop mining and valley fills permitting programs that do not include environmentally sensitive planning. The current review process in coalfield states should attempt to anticipate and prevent mine-related problems rather than to react to them.

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**DRAFT PEIS, PART I, SCOPING AND PUBLIC INVOLVEMENT, SECTION (G)(2)**  
**ISSUES RAISED DURING THE SCOPING PROCESS – [pages I-12 to I21]**

**COMMENTS**

Since no public scoping process was carried out in Tennessee, the following Draft PEIS sections should be revised to reflect evaluation and assessment of the Tennessee Federal Program and its Subchapter T – Programs for the conduct of Surface Mining Operations within Each State Part 942 –Tennessee, Sections 942.20 to 942.955.

The revised PEIS sections should reflect how the Tennessee Federal Program has assessed, evaluated and addressed the following: [before SOCM can give comments on mountaintop mining and valley fills]

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- (a) Direct Stream Loss, page I-12
- (b) Stream Impairment, I-13
- (c) Fill Minimization, page I-13
- (d) Assessing and Mitigating Stream Habitat and Aquatic Functions, page II-14
- (e) Cumulative Impacts, page I-15
- (f) Deforestation, page I-15

- (g) Blasting, page I-16;
- (h) Air Quality, page I-17
- (i) Flooding, page I-17
- (j) Land Use, page I-18
- (k) Threatened and Endangered Species, page I-18
- (l) Scenery and Culturally Significant Landscapes, Page I-19
- (m) Exotic and Invasive Species, page I-10
- (n) Valley Fill Stability, page I-20
- (o) Economics, page I-20
- (p) Environmental Justice, page I-21
- (q) Government Efficiency, page I-21

**COMMENTS:**

Executive Order 12898 was designed to focus the attention of federal agencies on the human health and environmental conditions in minority communities and low-income communities. It requires EPA, OSM, COE and FWS to adopt strategies to address environmental justice concerns within the context of agency operations, within the proposed Draft PEIS on Mountaintop Mining and Valley Fills. This document fails to provide the detailed guidance necessary to incorporate environmental justice goals and list actions that federal agencies would take to incorporate environmental justice into their missions. Small low-income communities are dismissively characterized in the Draft PEIS as "minor" impacts areas. Collectively, the affected rural communities of Kentucky, West Virginia, Virginia and Tennessee represent not only a large regional area, but also values basic to the heart and soul of the United States. The goal of "Environmental Justice" is for "fair treatment" of each unique small community of Appalachia. It is not to shift risks among populations, but to identify potential disproportionately high and adverse effects and identify alternatives that may mitigate these impacts. The Draft PEIS analyses makes inappropriate assumptions regarding cumulative effects to these communities. The Draft PEIS fails to exhaust all applicable analyses inside federal agencies and to incorporate the best data currently available from outside resources.

The Draft PEIS fails to identify:

All indirect impacts [40 CFR 1502.16(b)(1), 1508.8(b) 1508.9]

- growth effects
- population density
- changes in infrastructure
- growth rate
- air
- water
- ecosystems
- sacred sites

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**DRAFT PEIS, PART II. ALTERNATIVES, pages II A-1 to II D-8****COMMENTS:**

SOCM does support any of the proposed alternatives. Has the "no-action" alternative been fully considered by federal agencies? Many environmental impacts have been dismissed or understated by federal agencies. These federal agencies only address their responsibilities within their agencies while leaving the NEPA's "hard-look" to other agencies to address. There are important data gaps within the Draft PEIS. The "worst-case" analysis was not fully addressed within the Draft PEIS. The Draft PEIS is inadequate and does not justify the alleged "Purpose and Need" requirement of NEPA to conduct mountaintop mining and valley fills in West Virginia, Kentucky, Virginia and Tennessee. The feasible alternatives to the proposed federal action are not fully considered within the Draft PEIS. The Draft PEIS proposed mitigation plans are not adequate to address potential direct and indirect impacts. Again, the Draft PEIS is unclear to Tennessee State agencies' roles if any alternatives are approved.

SOCM expresses its concerns with the proposed three alternatives if each one weakens Tennessee's more restrictive standards, limitations, and requirements of its Water Quality Control's regulations and its NPDES and ARAP permitting programs. Pursuant to passed law cases and court decisions that give states the right to set effluent limitations that are more stringent than federal requirements. The 4<sup>th</sup> Circuit Court stated that the "NPDES permit program serves at least two purposes: it ensure that discharges are subjected to the scrutiny of the application process...; and it enables specification of discharge limitations, including more stringent state guidelines, for all effluent point sources." [53 FR 20764 and 54 FR 23868]

Tennessee administers its own NPDES program. According to EPA regulation 40 CFR 122.44(d) a state can set NPDES water quality standards which are more stringent than federal standards. Here lies the conflict with the proposed three alternatives within the proposed federal action regarding mountaintop mining and valley fills in Tennessee. In some permitting applications, not only would Tennessee have to revise its current NPDES permitting program, it would have to lower its current stringent standards and requirements.

The State of Tennessee would have to revise its current laws; Tennessee Water Quality Control Act, its Tennessee Code Annotated 69-3-101 to 69-3-137, and its Tennessee Safe Drinking Water Act of 1983, TCA 68-221-701 to 68-221-720 to comply with the lower standards within the proposed three alternatives outlined in the Draft PEIS.

The Office of Surface Mining Reclamation and Enforcement would need to revise its own Tennessee Federal Program, 30 CFR Subchapter T, Part 942 – Tennessee to meet the weaker proposed discharge and valley fills standards. The three alternatives raise concerns with the abilities of the State of Tennessee to "implement, administer and enforce all applicable requirements consistent with 30 CFR Subchapter T, Part 942." [see 30 CFR Sec. 732.15(b)(1)] The Draft PEIS does not provide a cost assessment review to

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implement any of three alternatives. The proposed Draft PEIS places the burden on Tennessee to adopt "irrelevant and inapplicable standards."

The Draft PEIS fails to identify the following sections in assessing how the Tennessee Federal Programs compare to other programs. The Tennessee Federal Program should already be carrying out much of the suggestions in following the alternatives sections:

PART II, Alternatives, Section A. (1) Programmatic Review, page II. A-1  
PART II, Alternatives, Section A. (2) Technical Studies, page II. A-2  
PART II, Alternatives, Section A. (3)(a)(b)(c)(d)(e) and (f), pages II. A-5 to II. A-8 does not fully cover the disposition of the issues.  
PART II, Alternatives, Section (B)(1) Overview of the Alternatives.  
PART II, Alternatives, Section (B)(2) Specific Actions Proposed by the Alternatives.  
PART II, Alternatives, Section (B)(3) Regulatory and Environmental Benefits of the Alternatives.  
PART II, Alternatives, Section (C)(1) Government Efficiency; Sub-issue: Coordinated Decision Making.  
PART II, Alternatives, Section (C)(2) Government Efficiency, Sub-issue: Consistent/Compatible Definition for Stream Characteristics and Analyses.  
PART II, Alternatives, Section (C)(3) Direct Stream Loss.  
PART II, Alternatives, Section (C)(4) Stream Impairment.  
PART II, Alternatives, Section (C)(5) Fill Minimization.  
PART II, Alternatives, Section (C)(6) Assessing and Mitigating Stream Habitat and Aquatic Functions.  
PART II, Alternatives, Section (C)(7) Cumulative Impacts.  
PART II, Alternatives, Section (C)(8) Deforestation.  
PART II, Alternatives, Section (C)(9) Air Quality.  
PART II, Alternatives, Section (C)(10) Flooding.  
PART II, Alternatives, Section (C)(11) Threatened and Endangered Species.  
PART II, Alternatives, Section (D)(1) Restricting Individual Valley Fills.  
PART II, Alternatives, Section (D)(2) Fill Restrictions Based on Identification of High-Value Aquatic Resources.  
PART II, Alternatives, Section (D)(3) Fill Production.  
PART II, Alternatives, Section (D)(4) Summary of Fill Restriction Alternatives.

#### ALTERNATIVES 2: [the Preferred Alternative]

#### COMMENT:

SOCM questions the Draft PEIS lack of assessment on the role of states and citizens during the decisionmaking process outlined in the Preferred Alternative. NEPA requires that all indirect impacts be addressed in the Draft PEIS. Without question the role of states and citizens in participating during the decision making process as it relates to preferred alternative should be stated in the Draft PEIS. All alternatives in the Draft PEIS are inadequate. Each fails to assess the full direct, indirect and cumulative damages to

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our nation's watersheds. The preferred alternative does not consider the log-term impacts for Mountaintop Removal mining and Cross Ridge mining in Tennessee.

#### DRAFT PEIS, PART III, AFFECTED ENVIRONMENT AND CONSEQUENCES OF MTM/VF, pages III A-1 to III W-6

#### COMMENTS:

Pages III, A-1 to III, W-6, describes the affected environmental and consequences of mountaintop mining and valley fills in the states of Kentucky, West Virginia, and Virginia. It does not provide the necessary science and rational framework which to identify and evaluate the impacts occurring from mountaintop "Removal" mining in Tennessee. In fact, SOCM knows of no SMCRA permits being approved for mountaintop "removal" mining (by definition) in Tennessee during the Draft PEIS study area project by OSM-Knoxville. The long-term impacts and its consequences in the coalfields of Tennessee are not documented in the "Study Area" which is described in Part III of the Draft PEIS.

Much of the data in the Draft PEIS for Tennessee is lacking to provide the needed scientific information for long-term impacts. Landscape disturbance affects the abundance and diversity of fish and game resources, drinking water quality and quantity, and the character of human communities. Federal and State agency management of landscape changes are often "after the fact". Federal agencies should gather more on gathering data over a longer period than the data in the Draft PEIS. Tennessee's data for the Draft PEIS from the "Study Area" of known violators of current regulation requirements.

The Draft PEIS, PART III fails to:

- Provide long-term impact data on the human environment impacts
- Provide long-term impacts data on assessments of mountaintop mining activities in Tennessee.
- Provide specific impacts arising from mountaintop mining in Tennessee.
- Provide investigation data from past EISs used to assess mountaintop mining activities.
- Provide direct and indirect aquatic resource impacts, along with documentation and validity data.
- Provide literature review of technical reports, newspaper articles, books, current journal articles, as well as the creation of impacts matrices information on mountaintop mining and valley fills.
- Provide adequate assessment and monitoring data from mountaintop mining operations.
- Provide aquatic impacts data from past mountaintop mining activities.
- Provide data to show the usefulness of mountaintop mining techniques for future mining activities in Tennessee.
- Provide data on the results from physical alternations of streams and aquatic resources, or even its impacts on aquatic life in streams.

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- Provide assessments comparing the impacts from other types of surface coal mining operations to impacts from mountaintop mining activities, on-site and off-site.
- Provide data on the effectiveness and validity of current mountaintop mining techniques to assess current, if any, practices in Tennessee.
- Provide data on the impacts of mountaintop mining on the aquatic and woodland ecosystems in Tennessee.
- Provide scoping information from Tennessee State agencies other than TDEC.
- Provide more in-depth scientific analysis database on potential impacts in Tennessee coalfields.
- Provide additional scoping data from outside specialists and resources that have the expertise on mountaintop mining impacts.
- Provide accurate and up-to-date information to assess future potential impacts.
- Provide information on the problems associated with the Tennessee Study Area data for each site listed in the Appendix: **DESCRIPTIONS OF GIS MINE POLYGONS IN THE CUMULATIVE IMPACT STUDY: TENNESSEE, pages 1-3.**
- Provide information on the cost to implement changes to 30 CFR 942.20 to 942.955 for each alternative being proposed in the Draft PEIS.
- Provide performance standards impacts to groundwater.
- Provide assessment for changes to 30 CFR 942.824, Special Performance Standards – Mountaintop mining of the Tennessee Federal Program.
- Provide effectiveness of mitigation and reclamation measures for mountaintop mining and valley fills program
- Provide post land use data to assess impacts.
- Provide forestry reclamation approaches to be used after mountaintop mining operations
- Provide data on Karst Systems in Tennessee.
- Provide assessment data on the three alternatives' effects on 30 CFR 942.700(a)(b)(c)(d).

The Draft EIS following sections does not cover all 22 counties in the Tennessee coalfields. The Draft PEIS is inadequate without complete data of all 22 counties covering Part III A to Part III W. The Draft PEIS should be revised to reflect this information. Federal agencies are required to integrate social science and economic information in the preparation of informed, sustainable land use planning decisions. Federal agencies are required under Section 102 of NEPA to "insure the integrated use of the natural and social sciences... in planning and decision making."

**DRAFT PEIS, PART III, A. Description of Study Area**

**DRAFT PEIS, PART III, B. Physical Setting**

**DRAFT PEIS, PART III, C. Appalachian Aquatic Systems**

**DRAFT PEIS, PART III, D. Impact Producing Factors to Headwater Systems from Mountaintop Mining**

**DRAFT PEIS, PART III, E. Coal Mine Drainage from Surface Mining**

**DRAFT PEIS, PART III, F. Appalachian Forest Communities**

**DRAFT PEIS, PART III, G. Relationships of Mountaintop Mining to Surface Runoff Quantity and Flooding**

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**DRAFT PEIS, PART III, H. Relationship of Mountaintop Mining to Groundwater Quality and Quantity**

**DRAFT PEIS, PART III, I. Overview of Appalachian Region Coal Mining Methods**

**DRAFT PEIS, PART III, J. MTM/VF Characteristics**

**DRAFT PEIS, PART III, K. Excess Spoil Disposal**

**DRAFT PEIS, PART III, L. Mine feasibility Evaluation and Planning**

**DRAFT PEIS, PART III, M. Coal Distribution and Markets**

**DRAFT PEIS, PART III, N. Past and Current Mining in the Study Area.**

**DRAFT PEIS, PART III, O. The Scope of remaining Surface-Minable Coal in the Study Area.**

**DRAFT PEIS, PART III, P. Demographic Conditions**

**DRAFT PEIS, PART III, Q. Economic Conditions**

**DRAFT PEIS, PART III, R. Land Use and Potential Development**

**DRAFT PEIS, PART III, S. Historic and Archaeological Resources**

**DRAFT PEIS, PART III, T. Economic Importance of existing Landscape and Environmental Quality**

**DRAFT PEIS, PART III, U. Social and Cultural Connections to Coal Mining and the Natural Environment**

**DRAFT PEIS, PART III, V. Relationship of Surface Mining and Air Quality**

**DRAFT PEIS, PART III, W. Blasting and the Local Community**

**COMMENT:**

The above sections does note some data on the Tennessee Federal Program on pages:

Part III B-3, Part III K-26, Part III K-35, Part III K-42, Part III K-51, Part III N-5, Part III T-2, but to specifically address mountaintop mining and valley fills, all above sections should have information about the Tennessee Federal Program.

**DRAFT PEIS, PART IV. ENVIRONMENTAL CONSEQUENCES OF THE ALTERNATIVES ANALYZED, pages IV A-1 to IV K-1**

**COMMENTS:**

The Draft PEIS is not accurate in describing and quantifying the extent and the nature of direct, secondary, and cumulative impacts associated with mountaintop mining and valley fills in Tennessee. The Draft PEIS fails to provide a coherent, organized agenda or schedule of commitments, proposal instruments and/or activities that elaborate and implement mountaintop mining and valley fills policy. It is in conflict with EPA's vision for watershed approaches. The watershed approach is a coordinating framework for environmental management that focuses public and private sectors efforts to address the highest priority problems within hydrologically-defined geographic areas, taking into consideration both ground and surface's water flow. The Draft PEIS is in conflict with Tennessee Division of Water Pollution's watershed approach policy and Tennessee/EPA

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Water Agreement. Much like EPA's watershed approach policy, Tennessee's has developed and implemented watershed approaches that do not address large-scale mountaintop mining and valley fills operations. The proposed federal action would require Tennessee to redesign its watershed approach policies and implement new costly strategies.

While the Draft PEIS does address some specific problems associated with on-site mountaintop mining and valley fills impacts, it fails to:

- Assess high priority problems associated with off-site impacts to the adjacent and surrounding watersheds, ecologically diverse hills and hollows, streams, and waterways.
- Assess impacts on future timber growth in the area.
- Assess the damage to the biological integrity of the study area.
- Assess functions lost by filling of headwater streams or the indirect to segments of streams from filling upstream portions.
- Assess biological needs of the aquatic ecosystem downstream.
- Assess operations that may severely impact biodiversity and environmental sustainability.
- Cumulative impacts from changes in topography and land cover results in the elimination of large tracts of habitats for native forest-interior species, the invasion of exotic plant, animal, and insect species, and micro-climatic changed.
- The scientific and analytic basis for comparisons lack complete and accurate information.
- Hollow fills associated with Mountaintop Removal mining that eliminates intermittent or ephemeral streams.

**The following sections fail to provide assessment and evaluation of the Tennessee Federal Program relating to mountaintop mining and valley fills per Alternatives noted in the Draft PEIS:**

**DRAFT PEIS, PART IV A Introduction**  
**DRAFT PEIS, PART IV B Aquatic Resources**  
**DRAFT PEIS, PART IV C Soils and Vegetation**  
**DRAFT PEIS, PART IV D Fish and Wildlife**  
**DRAFT PEIS, PART IV E Air Quality**

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**DRAFT PEIS, PART IV F Energy, Natural, or Depletable Resources Requirements**  
**DRAFT PEIS, PART IV G Cultural, Historic, and Visual Resources**  
**DRAFT PEIS, PART IV H Social Conditions**  
**DRAFT PEIS, PART IV I Economic Conditions**  
**DRAFT PEIS, PART IV J Recreation**  
**DRAFT PEIS, PART IV K Environmental Justice**

**COMMENT:**

Each of the above sections should be revised to include information how the Tennessee Federal Program has implemented its program in relating to mountaintop mining and valley fills.

**APPENDIX COMMENTS**

**APPENDIX A Ideas for Government Action**  
**APPENDIX B Programmatic Reviews**  
**APPENDIX C – REGIONAL SETTING SUPPORTING INFORMATION, pages, C-3, C-17, C-39 to C-41:**

**COMMENT:**

The quoted reference data is old data that should be updated to reflect new research information and discoveries over the last ten years.

**APPENDIX D Regional Setting Supporting Information**  
**APPENDIX E Terrestrial Technical Studies**  
**APPENDIX F – FEDERALLY LISTED T & E CANDIDATE AND SPECIES OF CONCERN, 22 pages.**

**COMMENT:**

The draft PEIS fails to address concerns with cumulative impacts in all 22 counties. The proposed federal action would allow the potential opening of sensitive watersheds to serious cumulative impacts to state and federal species. The NEPA "bigger picture" assessment is missing from the Draft PEIS as it relates to Tennessee's Division of Natural Heritage's state and federal listings in all (22) coalfield counties. The Draft PEIS fails to provide to Tennessee reviewers a clear picture of possible state and federal species put in harms way within the 22 county coalfields of Tennessee.

**APPENDIX G Socioeconomic Technical Studies**  
**APPENDIX H Engineering Technical Studies**  
**APPENDIX I Cumulative Impact Study**  
**APPENDIX J AOC+Policy**  
**APPENDIX K Flooding Analysis Guidelines**  
**APPENDIX L Cumulative Guidance**

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**AOC assessment concerns:****COMMENTS:**

The following was used to assess "state run programs" concerns relating to AOC. However, Tennessee's concerns are not specifically addressed since Tennessee was already under a federal program. Many of the below suggestions should have already been in used by the Tennessee Federal Program. After short term analyzing of the information gathered during the Draft PEIS process, the following conclusions and recommendations were developed by OSM to address state run SMCRA programs.

- OSM's own oversight evaluation indicates an industry trend of proposing to return mine sites to AOC with no AOC variance.
- Also, the evaluation revealed that policies or procedures used for determining when a mining operation's reclamation plan satisfies requirements established for AOC are either applied inconsistently or are overly broad, resulting in varied interpretations of what constitutes AOC.
- A major source of confusion over what qualifies as mountaintop mining operations, which require a variance from AOC, arises from OSM's method of classifying, in its permitting database, various mining methods as mountaintop operations, regardless of whether an AOC variance has been obtained or not. Although the tracking of mountaintop operations and associated waivers is not required by State or Federal law, OSM has made changes to its database and is in the process of reviewing all current surface mining permits to clearly identify which sites should be classified as mountaintop operations.
- OSM identified three significant areas in which the language of the approved State program differs from that of SMCRA and the Federal regulations. These language differences, which may have contributed to some of the other problems addressed in this report, relate to the following areas:
  - (1) documentation of the need and the market for the designated postmining land use,
  - (2) use of "woodlands" as an approved postmining land use, and
  - (3) allowing "public use" instead of "public facility (including recreational facilities) use" as a postmining land use.
- OSM has not determined the extent to which the above differences have contributed to inadequate documentation justifying an AOC variance and non-approved postmining land uses.

- Future discussions with WVDEP will identify the source of the problems and, if they are related to the approved program language, OSM will provide the State a notification requesting that the language be changed to correct the deficiencies. If, however, the problems are merely the results of inadequate implementation of the current State program requirement, OSM will work with WVDEP to put in place procedural revisions to prevent further occurrences.
- The oversight evaluation found that mountaintop permits have been issued with postmining and uses "forestry" and "fish and wildlife habitat" not authorized in the approved State program, although a program amendment to authorize "fish and wildlife habitat and recreation lands" is pending before OSM.
- OSM has requested that WVDEP immediately discontinue approving permits for unauthorized land uses, and that, in addition to those permits OSM examined in preparing this report, it review other permits currently in effect for similar problems. For all current mountaintop-removal permits already issued that have not properly applied the postmining land use provisions of the approved State program, OSM is requesting that WVDEP work with operators to ensure, where practicable, final reclamation achieves a postmining land use authorized by the program. OSM recognizes that the pending program amendment is intended to resolve some of these concerns and, with the release of this report, OSM plans to reopen the comment period on the State's proposed amendment concerning "fish and wildlife habitat and recreation lands." A notice will be published in the Federal Register, and comments will be solicited from the public.
- OSM found that all of the mountaintop-removal permits with AOC variances lacked at least some of the documentation required for approving the designated postmining land use. OSM has requested VDEP to initiate an immediate review of its permit application and permitting process to assure that the program requirements are being fully implemented. OSM is not proposing any corrective action for previously issued permits.
- In the review, OSM found four situations where steep-slope AOC variances had been granted, but where mountaintop-removal AOC variances would have been more appropriate because the entire coal seam or seams had been removed. OSM requests that WVDEP implement proper classification procedures for operations seeking AOC variances and review the appropriateness of AOC variances issued to steep-slope operations, taking corrective actions on existing permits, where practicable.



- The approved West Virginia program does not limit approval of an AOC variance for a steep-slope mine to the specific postmining land uses that are specified in SMCRA. OSM has requested that WVDEP submit an amendment to correct this deficiency, and WVDEP has filed a proposed rule with the West Virginia Legislative Rulemaking Review Committee to address the required amendment. OSM requests that WVDEP consider whether it is appropriate to issue any steep-slope AOC variances until an amendment is approved.

#### COMMENTS:

Does Virginia, Kentucky, and West Virginia currently use appropriate standards in evaluating whether a particular postmining land configuration constitutes a return to AOC? In *Bragg v. Robertson*, Memorandum opinion and Order of October 20, 1999, Judge Haden clearly points out that Director of West Virginia Department of Environmental Protection was enjoined from approving further permits because of inappropriate standards. State run programs have misinterpreted standards for characteristics of land after mining in terms of elevation changes, creation of valley fills, creation of level sections, and other general descriptive information. The issue is how many of those characteristics, either by themselves or in a general combination, may be used in misinterpreting if AOC has been achieved. VA, KY and WV state run programs have determined that a waiver from AOC requirements is necessary, has used misinterpreted standards to require appropriate postmining land uses in granting the waiver?

#### FEDERAL REQUIREMENTS

##### General AOC Requirements

1. Statute Section 701(2) of SMCRA defines "approximate original contour" to mean, that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with Section 515 (b)(8) of this Act.

30 U.S.C. 1291(2).

Section 515 of SMCRA sets forth environmental protection performance standards applicable to surface coal mining operations. 30 U.S.C. 1265. Among these is the requirement to return the land to AOC pursuant to Subsection 515(b)(3), mine operators must "backfill, compact . . . and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated." 30 U.S.C. 1265(b)(3).

#### 2. OSM's Treatment of AOC in Rules

In its national regulations and in approving individual State programs, OSM adopted the statutory definition of AOC essentially unchanged. In the development of national regulations, the only discussion where elevation change was mentioned in relation to AOC is in the preamble to the rules regarding thick or thin overburden. The permanent program rules promulgated in 1979 defined thin overburden as overburden where the final thickness is less than 0.8 times the initial thickness and thick overburden as overburden where the final thickness is greater than 1.2 times the initial thickness. The preamble stated:

*The definition of approximate original contour states that the reclaimed area should closely resemble the general surface configuration of the land prior to mining. OSM interprets this to mean that the approximate original contour, or configuration, of the premining land is intended, and minor changes in elevation are anticipated.*

44 Fed. Reg. 15231 (March 13, 1979).

*Thus, an elevation change of plus or minus 20 percent was accepted as AOC in those rules. In 1983, those numerical limits were deleted from the thick and thin overburden rules. See 48 Fed. Reg. 23356, 23365 (May 24, 1983). In 1988, the D.C. Circuit upheld the remand of those rule changes because the Secretary had failed to explain his reasons for removing the numerical limits. National Wildlife Federation v. Hodel, 839 F.2d 694, 734 (D.C. Cir. 1988). In 1991, OSM again published rules addressing thick and thin overburden. Again OSM declined to set a numerical limit and asserted that the issue was best left to the regulatory authority. The preamble contains cross sections showing elevation changes of greater than plus or minus 20 percent that would still be considered AOC. This rule was never challenged and remains in place today. See 56 Fed. Reg. 65629-95633 (December 17, 1991).*

*In 1987, OSM issued Directive INE-26 to provide guidance to OSM field personnel in evaluating AOC issues during oversight. The Directive makes three points with respect to AOC. First, because both the permittee and the regulatory authority (as well as other interested parties) need a clear understanding prior to mining of what the final postmining topography will be, the anticipated postmining topography must be determined in the permitting process to enable a determination if AOC will be achieved. Second, inspections should ensure that the approved postmining topography is being reasonably achieved, including general surface configuration, drainage, and elimination of highwalls and spoil piles. Third, in oversight, considerable deference should be given to prior decisions by the State, particularly where the final grade work has been done. In recognition of the emphasis that the 1987 Directive places on the role of the permitting process in applying AOC requirements to specific operations, the current review looked to see what WVDEP was accepting as meeting AOC requirements in the permitting process.*



Federal Requirements Relating to Mountaintop Removal Mining Operations

Section 515 of SMCRA contains specific performance standards for mountaintop-removal mining. Subsection 515(c) permits an exception to the AOC restoration requirement for mountaintop removal operations which, after reclamation, would be capable of supporting specific postmining land uses. In such operations, instead of restoring the site to approximate original contour, the operator is permitted to remove all of the overburden and create a level plateau or a gently rolling contour with no highwalls remaining. 30 U.S.C. 1265(c). Subsection 515(c)(3) lists the allowable postmining land uses: "industrial, commercial, agricultural, residential or public facility (including recreational facilities) use[s]." 30 U.S.C. 1265(c)(3). In demonstrating the feasibility and practicability of the proposed postmining land use, the applicant must include specific plans and show that the use will be:

- (1) compatible with adjacent land uses;
- (2) obtainable according to data regarding expected need and market;
- (3) assured of investment in necessary public facilities;
- (4) supported by commitments from public agencies where appropriate;
- (5) practicable with respect to private financial capability for completion of the proposed use;
- (6) planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and
- (7) designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

30 U.S.C. 1265(c)(3)(B).

The Federal regulations pertaining to mountaintop-removal operations are found at 30 C.F.R. 785.14 and Part 824. The regulations generally track the language of SMCRA, but do clarify the applicable requirements in the following respects:

- A requirement for compliance with the alternative postmining land use provisions of 30 C.F.R. 816.133(a) through (c) [30 C.F.R. 824.11(a)(4)];
- A specification that final graded slopes on the plateau portion of the operation not exceed 1v:5h (20%) [30 C.F.R. 824.11(a)(7)];

- A requirement that plateau outcrops attain a minimum static safety factor of 1.5 or that they not exceed 1v:2h (50%) [30 C.F.R. 824.11(a)(7)];
- A requirement that the resulting level or gently rolling contour be graded to drain inward from the outslope [30 C.F.R. 824.11(a)(8)]; and
- A clarification that the prohibition on damage to natural watercourses applies only to watercourses below the lowest coal seam to be mined [30 C.F.R. 824.11(a)(9)].

Must also constitute an equal or better use Pursuant to SMCRA, the State may grant a permit with a mountaintop-removal AOC variance only after finding that:

- the proposed postmining land use constitutes an "equal or better use;"
- the proposed use will be compatible with adjacent land uses and existing land use plans;
- county commissions and other State and Federal agencies have been provided an opportunity to comment on the proposed land use; and
- the application contains specific plans and assurances that the proposed use will be (1) compatible with adjacent land uses; (2) practicable with respect to financing and completing the proposed use; (3) supported by commitments from public agencies where appropriate; (4) planned pursuant to a schedule that will integrate the mining operation and reclamation with the postmining land use; and (5) designed by an approved person to assure the stability, drainage, and configuration necessary for the intended use of the site.

REVIEW METHODOLOGY

Beginning in 1997, the public and media began to focus increasing attention on "mountaintop operations" in West Virginia. Commonly understood, this term refers to any operation that removes all or part of the top of a mountain or ridge and places the overburden or excess spoil resulting from the removal into valley fills. As used in this report, the broad term "-mountaintop operations" should be distinguished from the narrower term "mountaintop-removal (AOC variance) operations".

Three types of "mining practices are included in the term "mountaintop operations". These types are:

1. "Mountaintop-removal (AOC variance) operations" - Mines which remove all of the coal seam or seams in the upper fraction of a mountain or ridge and request a "mountaintop-removal variance from AOC. Only this kind of operation constitutes a "mountaintop-removal mine in the regulatory sense.

2. Mines which remove all of the coal seam or seams in the upper fraction of a mountain or ridge and return the land to AOC.

3. Mines in steep-slope areas (slopes exceeding 20 degrees) which have received steep-slope AOC variances according to State records. Notwithstanding regulatory definitions, OSM recognizes that the public's concern is not confined to any one of these "mining scenarios, but encompasses all three.

The Draft PEIS has not addressed these standard requirement issues, but has proposed developing even a more confusing reviewing SMCRA permit process as an alternative.

#### TENNESSEE STATE PARKS AND NATURAL AREAS AND WILDLIFE MANAGEMENT AREAS CONCERNS

The Draft PEIS fails to provide detail scientific information on any significant impacts to Tennessee's State Park Systems, Natural Areas, and Wildlife Management Areas found in the coalfield counties of Tennessee.

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#### CONCLUSIONS

SOCM finds the Draft PEIS to be inadequate and too deficient to assess and evaluate the proposed federal action on the Tennessee Federal Program and its program-wide impacts and support program-level decisions that are reasonable and defensible to the current issues surrounding potential mountaintop mining and valley fills, mountaintop removal mining and cross ridge mining in the coalfields of Tennessee. The Draft PEIS baseline data has been inconsistent and used inappropriately to analyze the potential impacts of mountaintop mining and valley fills, mountaintop removal mining and cross ridge mining operations in the coalfields of Tennessee. The specific data needed to analyze the Tennessee Federal Program has been insufficient to support the proposed Alternatives listed within the Draft PEIS. The fundamental requirements of CEQ and/or NEPA process require the lead agency to begin with comprehensive scoping. The scoping process in Tennessee was inadequately carried out by federal agencies whose only scoping seems to be inhouse. Input from scoping process should then be used to define the proposed alternatives that would avoid or substantially lessen the significant effects of proposed mountaintop mining and valley fills. These requirements have not been met in the circulated document in Tennessee. The stated objectives in the "Notice of Intent" of February 5, 1999 would not be realized through the preferred Alternative. The Draft PEIS is bias in that it fails to take the required "hard look" at the proposed federal action. The proposed Alternatives are misleading and inaccurate in representing the Tennessee Federal Program.

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A Programmatic Environmental Impact Statement that would represent Tennessee needs to provide comprehensive scoping from coalfield citizens and state and local agencies, as well as the business community in each county, include an updated and consistent baseline data, be free of inconsistencies, have proper levels of analysis and explanation, and present impact assessments to Tennessee's natural environment and Tennessee's economy in the communities of the Tennessee coalfields. The Draft PEIS should conduct a "hard look" scenario at every significant impact. SOCM believes that these federal agencies should go back to the preliminary Draft EIS and start all over again.

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Save Our Cumberland Mountains, Inc.  
Stripmine Issues Committee

## ATTACHMENTS

1. Map and listing of the Draft PEIS "Study Areas" in Tennessee.
- 2A. Eastern Minerals Int'l v. The United States, Supreme Court No. 01-1100 (2002)
- 2B. Eastern Minerals Int'l v. The United States Fed Cl No. 99-5054, 5059 (2001)
- 2C. Cane Tennessee, Inc. and Colton, Inc. v. The United States Fed. Cl 96-237L (1999)
- 2D. Rith Energy, Inc. v. The United States, Supreme Court No. 01-1145 (2002)
- 2E. Rith Energy, Inc. v. The United States, Fed. Cl No. 99-5153 (2001)
- 2F. Rith Energy, Inc. v. The United States, Fed. Cl No. 99-480L, (June and July, 1999)
- 2G. SOCM v. OSM and Skyline Coal Company, NX-97-3-PR (1998)
3. Article by Mr. Bob Keast, Executive Director of Tennessee Association of Resorts, Marinas and Marine Dealers.
4. Article, "GOVERNOR BACKS CREDIT CARD CHECK", by Bill Poovey, AP Wire Service, THE TENNESSEAN NEWSPAPER, Saturday, July 7, 2003.
5. Article, BREDESEN OUTLINES PLANS TO EXPAND TOURISM ECONOMY" by Bob Keast.
6. Report, THE ECONOMIC IMPACT OF TRAVEL ON TENNESSEE COUNTIES, by The Tennessee Department of Tourist Development (2000)
7. Report, AN ECONOMIC REPORT TO THE GOVERNOR OF THE STATE OF TENNESSEE, by the UT's Center for Business and Economic Research (February, 2003)
8. Report, TENNESSEE BUSINESS AND ECONOMIC OUTLOOK, by UT's Center for Business and Economic Research (Spring, 2002)
9. Report, TENNESSEE BUSINESS AND ECONOMIC OUTLOOK, by UT's Center for Business and Economic Research (Fall, 2002)
10. Report, AN ANALYSIS OF AN ECONOMIC REPORT TO THE GOVERNOR OF THE STATE OF TENNESSEE, Tennessee Comptroller of the Treasury, (2001)
11. Report, TENNESSEE ECONOMIC OVERVIEW (2001)
12. Report, GENERAL ECONOMIC CHARACTERISTICS IN TENNESSEE, Examining Changes in Labor Market Conditions and Income Levels, 1990-2000, by UT's Center for Business and Economic Research (2001)
13. Mining Industry Labor Force data.
14. Information on Tennessee Arts' economic impacts in the Tennessee coalfields
15. Letter to State of Tennessee on SOCM's concerns to Economic and Community Development in the Tennessee coalfields
16. US Fish and Wildlife Service, "STRATEGIES PLAN FOR CONSERVATION OF FISH AND WILDLIFE TRUST RESOURCES IN THE LOWER-CUMBERLAND ECOSYSTEM"
17. Memorandum, US Fish and Wildlife Service, September 21, 2001)
18. Letter, SOCM to US Army Corps of Engineers and EPA on concerns with proposed revisions to the Clean Water Act. Dated July 16, 2000.
19. Copy, Programmatic Agreement between the Federal Highway Administration and other organizations and Tennessee Department of Environment and Conservation and Tennessee State Historic Preservation Office.

20. Information on the Trail of Tears National Historic Trail's Draft Comprehensive Interpretive Plan.
21. Information on Tennessee Parks and Greenways Foundation Strategies conflicts with proposed federal action.
22. Listings of Rare Species in the 22 coalfield counties of Tennessee.
- 22A. Listings of species found in the Draft PEIS.
23. Information on State of Tennessee's Bioassessment Program.
24. Information on AVS program.
25. Information on Tennessee AML program.
26. Information on Tennessee Elk Restocking Program.
27. Information on OSM's Reforestation and Wildlife Habitat Enhancement Initiative
28. The Draft PEIS Regional Setting Supporting information.
29. Report, "Mountaintop Removal Mining: An Environmental Impact Assessment (EIA) Scoping Exercise and Impact Assessment of Mining Activities on Aquatic Resources", by Mr. Jeff Lee Hansbarger
30. Copy, State of Tennessee's Controller of the Treasury Performance Audit on "Water Quality" in Tennessee. (2001)
31. Supplement Informational Brochures from Tennessee's coalfield counties.

----- Forwarded by David Rider/R3/USEPA/US on 01/08/2004 11:39 AM -----

Vince Meleski  
<vince@wildalabama.org>  
To: R3 Mountaintop@EPA  
cc: Subject: Mountaintop Removal Mining Comments  
12/23/2003 02:24 PM

Mr. John Forren  
U.S. EPA (3FA/30)

1650 Arch Street Philadelphia, PA 19103

It is hard to believe that the Bush administration plans to continue to allow coal companies to destroy Appalachia with mining practices that level mountaintops, wipe out forests, bury streams, and destroy communities. The existing evidence of recent events and the facts presented in the Draft Environmental Impact Statement should be enough to convince you that mountaintop removal coalmining must be significantly limited or stopped.

As described in the administration's Draft Environmental Impact Statement (DEIS) on mountaintop removal coal mining, the environmental impacts of mountaintop removal are widespread, devastating, and permanent. Yet the

DEIS proposes no restrictions on the size of valley fills that bury streams, no limits on the number of acres of forest that can be removed, no protections for wildlife, and no safeguards for the communities and people that depend on the region's natural resources for themselves and future generations.

The administration's "preferred alternative" for addressing the problems caused by mountaintop removal coal mining is to weaken existing environmental protections. The DEIS proposes streamlining the permitting process and allowing mountaintop removal and associated valley fills to continue at an accelerated rate. The DEIS also proposes doing away with a surface mining rule that makes it illegal for mining activities to disturb areas within 100 feet of streams unless it can be proven that streams will not be harmed. This is ridiculous! This "preferred alternative" ignores the administration's own studies detailing the devastation caused by mountaintop removal coal mining, including:

- without new limits on mountaintop removal, additional mountains, streams, and forests will be destroyed by mountaintop removal mining
- the fact that impacts to streams would be greatly lessened by reducing

the size of the valley fills where mining wastes are dumped on top of streams

- the impact on wildlife species
- the total of past, present and estimated future forest losses
- even if hardwood forests can be reestablished in mined areas, which is unproven and unlikely, there is no way these areas can be restored similar to the handiwork created by God

The "preferred alternative" ignores these and hundreds of other scientific facts contained in the DEIS studies. It appears the only goal is to increase mountaintop removal coal mining with little regard for the environment. In light of these facts, the Bush administration must consider alternatives that reduce the environmental impacts of mountaintop removal and then implement measures to protect natural resources and communities in

Appalachia, such as limitations on the size of valley fills to reduce the destruction of streams, forests, wildlife and communities.

Better yet mountaintop removal should not be permitted at all.

Vince Meleski

Program Director

Wild Alabama/Wild South

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Member of:

Southern Appalachian Forest Coalition

National Forest Protection Alliance

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**APPALACHIAN CITIZENS LAW CENTER, INC.**

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AMANDA MOORE  
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Director

REC'D JAN 06 2004

January 2, 2003

Mr. John Forren  
U.S. EPA (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

**Re: Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic  
Environmental Impact Statement**

Dear Mr. Forren:

Thank you for the extended opportunity to comment on the Draft Environmental Impact Statement (Draft EIS) on Mountaintop Mining and Valley Fills in Appalachia. This letter is in addition to oral comments presented by the Appalachian Citizens Law Center (Law Center) at the public hearing held in Hazard, Kentucky on July 22, 2003:

The Law Center is a non-profit law office serving the Appalachian coalfields by providing free legal services to low-income families and communities on coal-related issues such as black lung benefits, mine safety matters, and environmental concerns. By having such a broad focus on the impacts of the coal industry, we see the consequences of mountaintop mining both on the surrounding communities and on the miners themselves.

As we stated at the public hearing, the Law Center is extremely disappointed in this much-anticipated Draft EIS. Attached to the Draft EIS are numerous studies detailing the environmental destruction caused by mountaintop mining and valley fills, yet the Draft EIS fails to suggest even one alternative to curb the destruction. This chasm between the scientific studies and the proposed actions highlights the arbitrary and capricious nature of the entire Draft EIS. The following examples highlight the disparity between the documented environmental impact of mountaintop mining and the agencies' proposed actions in response:

- **Data:** During the study period, 724 miles of stream were covered by valley fills. Draft EIS, ILC-30. Constructing valley fills on top of streams will "eliminate stream biota and the ability of these organisms to synthesize organic material to provide life . . . for down stream reaches." Draft EIS, ILC-30.  
**Proposed Action:** Rather than proposing additional protections for streams from valley fills, the Draft EIS proposes exempting valley fills from the stream buffer zone rule. Draft EIS, ILC-35.

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- WORKING FOR JUSTICE IN THE APPALACHIAN COAL FIELDS -

- **Data:** In just the last ten years, 1,200 miles of streams have been affected by surface mining activities. Draft EIS, ILC-30. In addition, 438,472 acres of watersheds have been affected by valley fill construction. Draft EIS, ILC-38.  
**Proposed Action:** Rather than curbing the amount of streams and watersheds affected by mining, the agencies will instead "continue to evaluate" the effects of mountaintop mining and "continue to work" to refine protocols, decisions, and requirements. Draft EIS, ILC-44.

- **Data:** From the late 1980s to the late 1990s, the average fill increased in size by 72 percent, and the average length of stream affected per fill increased by 224 percent. Draft EIS, I-5. From 1985 to 2001, 83,797 acres of land were covered by valley fills in the study area. Draft EIS, ILC-32, 33.  
**Proposed Action:** Rather than imposing limits on fill size, OSM will "continue the on-going rule-making process to clarify obligations of the operator" and will "consider whether additional future rulemaking is warranted." Draft EIS, ILC-49.

- **Data:** Mountaintop mining is likely to increase flooding from intense summer thunderstorms, particularly during storm systems that last several days. Draft EIS, Appendix H, USGS Executive Summary: Comparison of Storm Response of Streams in Small, Unmined and Valley-Filled Watersheds, 1999-2001, Ballard Fork, West Virginia (pp. 5-6). Even after reclamation, discharge from valley fills was 42 percent higher than premining conditions. This increase raised the 100-year flood stage by more than two feet. Draft EIS, Appendix H, OSM Valley Fill Study, Hobet Mine Westridge Valley Fill, U.S. Army Corps of Engineers, Pittsburgh District (p.22).

**Proposed Action:** In spite of these studies, the Draft EIS contends that no conclusions can be made about the impacts of mining on runoff. Therefore, the EIS proposes that the agencies develop guidelines to evaluate flooding risk, which "could make the permit evaluation more efficient." Draft EIS, ILC-90.

- **Data:** The forests in the study area are very diverse, but a fundamental change from a forested habitat to grasslands could occur, thereby jeopardizing the "biological integrity of the study area" and leading to "biological collapse." In eastern Kentucky alone, 255,582 acres of forest have been lost to mountaintop mining in just the past ten years. Draft EIS, Appendix I, EPA Landscape Scale Cumulative Impacts Study of Mountaintop Mining Operations.

**Proposed Action:** OSM will compile a manual with guidelines for post-mining land use. OSM will require reclamation with trees only if legislative authority is established. Even then, there might be an exception to the requirement if the applicant could demonstrate that uses other than forestry would provide greater environmental benefits. Draft EIS, ILC-83.

The environmental problems chronicled in the Appendices are serious and potentially devastating, yet the Draft EIS suggests "actions" that do nothing to curb the environmental destruction. The residents of Appalachia need real actions to protect their land and communities from the destruction that is so clearly detailed in the Appendices to the Draft EIS.

The Draft EIS additionally fails to consider an adequate range of alternatives. Rather than proposing alternatives to limit the environmental impacts of mountaintop mining, the Draft EIS

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goes to the extreme opposite and presents alternatives to make the permitting process easier. A preliminary Draft EIS from January 2001 presented three separate alternatives that limited valley fills in some way. The current Draft EIS, however, does just the opposite by proposing three alternatives that in no way limit fills. The stated reason for not including at least one alternative that limits fills – that there is not enough scientific evidence that such limits would reduce stream impacts – defies common sense as well as the findings of the studies attached to the Draft EIS. The narrow range of alternatives examined in this Draft EIS is arbitrary and capricious, and the Law Center supports none of the alternatives presented.

As we have stated in earlier comments on separate proposals, the Law Center does not believe that issuing permits to dump mining waste in streams is legal under the Clean Water Act as passed by Congress. However, given the narrow options presented by the Draft EIS, one aspect of Alternative 1 is preferable to the other alternatives – that valley fills will be presumed to require individual 404 permits (IPs) from the Army Corps of Engineers rather than falling within nationwide permit 21 (NWP 21). However, Alternative 1 remains flawed because it includes the offensive proposal to eliminate the stream buffer zone rule with regard to excess spoil disposal. We have submitted comments previously opposing such a potential rule.

While the Law Center certainly is not opposed to increased government efficiency, such efficiency must not come at the expense of the human or natural environment. The agencies responsible for this Draft EIS have made just such a mistake, however, by choosing a course of action that will make the mining permitting process easier for coal companies while failing to provide any increased protections for the environment or the communities living near these mines. The agencies' chosen "efficiency alternative" does not even meet the stated purpose of this EIS, which is "to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills." Draft EIS, I-2. Once again, this Draft EIS is internally inconsistent and arbitrary and capricious.

In addition, we support the comments submitted to you by Kentuckians for the Commonwealth, Ohio Valley Environmental Coalition, Kentucky Waterways Alliance, Sierra Club, Earthjustice, and Trial Lawyers for Public Justice. The Law Center urges you to consider these comments and return to the Draft EIS to make changes that will provide a real benefit to the whole of Appalachia by preserving its natural environment and protecting its residents. Give the public a meaningful range of alternatives and proposed actions that are based on the studies detailing the myriad problems caused by mountaintop mining. Give us a Draft EIS that is not an arbitrary and capricious abuse of agency power.

Please feel free to contact me if you would like to discuss our concerns further.

Sincerely,

*Amanda Moore*  
Amanda Moore  
Staff Attorney

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# West Virginia Council of Trout Unlimited

January 6, 2004

Mr. John Forren  
U.S. EPA (3EA30)  
1650 Arch Street  
Philadelphia, PA 19103  
mountaintop.r3@epa.gov

Dear Mr. Forren:

These comments represent the views of the members of the West Virginia Council of Trout Unlimited (WVCTU) in response to the request for comment on the Draft Programmatic Environmental Impact Statement ("DEIS") on mountaintop removal coal mining and associated valley fills in Appalachia, published at 68 Fed. Reg. 32487 (May 30, 2003) by the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (COE), U.S. Fish and Wildlife Service (FWS), U.S. Office of Surface Mining (OSM) and West Virginia Department of Environmental Protection (WVDEP).

WVCTU has a focused mission of conserving, protecting and restoring North America's coldwater fisheries. WVCTU represents over 1500 volunteer members in West Virginia. We are confident that you will receive many comments from highly qualified parties addressing the technical details of the DEIS. WVCTU will limit our comments to a broader perspective that more accurately represents the position of our members.

WVCTU is completely and unequivocally opposed to the degradation or destruction of any stream, particularly headwater streams. Many of the stream sections being eliminated are, have been, or should be, native Brook trout streams. The native Brook trout is the West Virginia State Fish and is an irreplaceable resource. Any activity leading to the detriment of cool/cold water resources and the associated ecosystems is simply unacceptable under any circumstance.

WVCTU is strongly opposed to any intrusion or destruction of riparian buffer zones. Riparian buffer zones are critical components of stream health. Buffer

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zones filter water runoff from the surrounding lands, provide nutrient matter for benthic populations and shade the stream helping to cool the water during warm temperatures. The elimination of riparian buffer areas causes a direct impairment to water quality, and negatively influences designated and existing uses.

5-3-2

WVCTU is opposed to mountaintop removal coal mining in general due to the overwhelming loss of aesthetic values. Our members have a great affinity for being outdoors enjoying our forests and streams. There is probably nothing more unpleasant than being outdoors with the backdrop of a barren, rubble strewn wasteland created by mountaintop removal. That backdrop is becoming far too common in many areas.

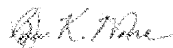
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WVCTU looks forward to working with the EPA in protecting our irreplaceable resources from the type of devastation brought about by mountaintop removal coal mining. Our water resources are a very important part of our heritage and they must be preserved and protected for the generations to follow. WVCTU will pursue any appropriate means necessary to protect these streams and resources from total destruction.

Thank you for the opportunity to provide these comments on behalf of the members of the West Virginia Council of Trout Unlimited.

Sincerely,



Bryan K. Moore, Chair  
WVCTU  
787 Twin Oaks Dr.  
Bridgeport, WV 26330-1645

Earthjustice ♦ Natural Resources Defense Council ♦ American Rivers ♦  
Friends of the Earth ♦ National Audubon Society ♦ National Wildlife Federation ♦  
Sierra Club ♦ Shagbark ♦ Valley Watch ♦ West Virginia Citizen Action ♦  
West Virginia Environmental Council ♦ West Virginia Rivers Coalition

January 6, 2004

Mr. John Forren  
U.S. EPA (3EA30)  
1650 Arch Street  
Philadelphia, PA 19103

Delivered via U.S. Mail and Email ([mountaintop.r3@epa.gov](mailto:mountaintop.r3@epa.gov))

Dear Mr. Forren:

These comments are submitted by Earthjustice, the Natural Resources Defense Council, American Rivers, Friends of the Earth, National Audubon Society, National Wildlife Federation, Sierra Club, Shagbark, Valley Watch, West Virginia Citizen Action, West Virginia Environmental Council, and West Virginia Rivers Coalition in response to the request for comment on the Draft Programmatic Environmental Impact Statement ("DEIS") on mountaintop removal coal mining and associated valley fills in Appalachia, published at 68 Fed. Reg. 32487 (May 30, 2003) by the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (COE), U.S. Fish and Wildlife Service (FWS), U.S. Office of Surface Mining (OSM) and West Virginia Department of Environmental Protection (W.V. DEP) (hereinafter "the agencies"). We hereby incorporate by reference all documents cited in these comments.

In mountaintop removal coal mining, vast areas of forest are stripped from the land and the tops of mountains are blasted apart and removed to extract thin seams of coal within the mountains. The waste rock, or "excess spoil," from this process is usually disposed of in nearby valleys, creating enormous "valley fills" that have already buried and destroyed hundreds of miles of Appalachian streams. Generations-old communities are forced from their homes by the blasting, flooding, and environmental destruction. Fish and wildlife habitat is damaged or destroyed, including habitat of threatened and endangered species. An environmentally, socially, economically, and historically important region of this country is being leveled by mountaintop removal coal mining. It is no overstatement to call this an environmental apocalypse – it is certainly one of the worst examples of plundering the environment occurring anywhere in this country today.

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The original purpose of the mountaintop removal programmatic EIS was to develop policies and procedures to "minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources from mountaintop [removal] mining operations, and to environmental resources that could be affected by the size and location of fill material in valley fill sites."<sup>1</sup> **The May 30, 2003 DEIS has completely abandoned this purpose. It contains no meaningful, substantive alternatives or**

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<sup>1</sup> See 64 Fed. Reg. 5830 (February 29, 1999) (emphasis added).

recommendations that would minimize to any degree the environmental harm caused by mountaintop removal coal mining, let alone policies or procedures to reduce these harms to "the maximum extent practicable."<sup>2</sup>

Instead, the only alternatives offered by the DEIS all involve changes to the federal permitting process that are calculated to "streamline" agency decision making to make it easier for coal companies to continue mountaintop removal strip mining, and weaken existing environmental safeguards that are designed to reduce the environmental destructiveness of mountaintop removal and valley fills. All of the DEIS' alternatives (even the so-called "No Action" alternative) propose gutting the surface mining law's Buffer Zone rule that currently prohibits mining activities from disturbing areas within 100 feet of larger streams.

Unlike the DEIS released by the Bush administration, earlier drafts of the programmatic EIS did consider alternatives that would substantially reduce the harm caused by mountaintop removal, most significantly by limiting the size of valley fills. The January 2001 Preliminary Draft evaluated four options, including two that would have restricted the size and placement of valley fills in certain types of streams.<sup>3</sup> But these and similar alternatives for limiting the size and location of mountaintop removal and valley fill operations have been completely eliminated from the May 30 DEIS, despite the fact that the studies accompanying the DEIS fully support options to limit mountaintop removal and valley fills.<sup>4</sup>

In sum, the DEIS ignores the scientific and economic studies it was supposed to be based upon, contravenes the very purpose of the EIS, violates the National Environmental Policy Act (NEPA), and demonstrates a startling disregard of the agencies' legal duties to protect the natural resources and people of Appalachia and the rest of the country. This approach is not supported by law, policy, science, common sense, or humanity. The studies accompanying the DEIS confirm that mountaintop removal is wiping out an entire region of the United States – hundreds of square miles of communities, wildlife resources, streams, mountains, and forests – human communities and natural resources that can never be replaced.

The approach taken by the DEIS is particularly unconscionable given the permanent and pervasive environmental devastation caused by mountaintop removal coal mining documented by the approximately 5000 pages of scientific studies accompanying the DEIS. These studies not only confirm the obvious conclusion that blowing up mountains, wiping out forests, and burying streams under millions of tons of rubble has irreversible and extensive environmental consequences, but also that a failure to impose meaningful limits on such practices will more than double the widespread damage that has already been done to resources of regional and national importance. The failure of the DEIS to even consider, let alone select,

<sup>2</sup> The DEIS states that its purpose is to "evaluate options for improving agency programs . . . that will contribute to reducing the adverse environmental impacts of mountaintop [removal] mining operations and excess spoil valley fills (MTM/VF) in Appalachia." DEIS ES-1, an overly optimistic description given the actual content of the DEIS, but a purpose that falls far short of minimizing such impacts to the "maximize extent practicable."

<sup>3</sup> Mountaintop Mining / Valley Fill EIS, Preliminary Draft, January 2001, at ES-6.

<sup>4</sup> The studies in the DEIS supported the contention that limiting the size and placement of valley fills was environmentally preferable to alternatives such as those contained in the DEIS which contain no such limits. The option of eliminating valley fills altogether – likely the most environmentally beneficial option of all – was not evaluated by these studies.

alternatives to reduce this environmental catastrophe being inflicted on Appalachia by the coal mining industry is nothing short of stunning.

In order to fulfill the purpose of the EIS, be consistent with the findings of the studies on mountaintop removal, and meet the agencies' obligations under NEPA and other federal laws, the DEIS must be rewritten to consider substantive alternatives that would minimize the environmental harm caused by mountaintop removal and select a preferred alternative that would truly protect the resources and people of the region.

#### **A. The Evidence of Devastation Caused By Valley Fills Is Overwhelming and Claims That Valley Fills Cause No Harm to the Environment and Human Communities Are False**

The DEIS attempts to deny or minimize the significance of the environmental harm caused by mountaintop removal mining and valley fills, both by downplaying the magnitude of the harm documented in the scientific studies accompanying the DEIS and by failing to recommend meaningful ways to limit the damage.<sup>5</sup> But the evidence presented throughout the document's appendices illustrates the devastating impacts to streams, forests, wildlife habitat and human communities that has already occurred and that is projected to continue for the foreseeable future if restrictions on mountaintop removal are not implemented. The DEIS' recommendation for "action alternatives" is not supported by the record of harm included in the technical and scientific studies accompanying the decision document.<sup>6</sup>

To begin with, there is the matter of permanent and irreversible loss of streams mined or buried under hundreds of millions of tons of rubble and waste rock. Incredibly, "direct" stream impacts such as these are not included in the DEIS calculation of whether or not valley fills cause environmental harm. While this omission may be convenient for the purpose of twisting the DEIS analysis to fit a desired outcome, the fact remains that the DEIS' own studies conclude that more than 1,200 miles of headwater streams in Appalachia have already been buried or destroyed, with another 1,000 miles projected for burial and destruction in the next ten years if limits are not placed on mountaintop removal operations.<sup>7</sup> The functions and values of those streams, as well as any wildlife that were unlucky enough to be present when the mountaintops were blown away, are lost forever. The studies found that no scientific basis could be

<sup>5</sup> For example, the DEIS incorrectly claims that "[w]atershed impacts directly attributable to mining and fills could not be distinguished from impacts due to other types of human activity." DEIS II.C-74, and "the EIS studies did not conclude that impacts documented below MTM/VF operations cause or contribute to significant degradation of waters of the U.S." DEIS II.D-9. Such claims are irrefutably contradicted by the data contained in the EIS studies.

<sup>6</sup> The studies accompanying the May 30 DEIS – the technical, scientific and economic studies contained in the appendices – were prepared for as used as the basis of the January, 2001 Preliminary EIS. These findings of these studies fully support action alternatives to limit mountaintop removal and valley fills. As discussed further below, while these studies form the appendices of the May 30 DEIS, they do not provide a basis of support for the DEIS' action alternatives.

<sup>7</sup> It is important to note that many studies indicate that these reported stream impacts are likely to be a gross underestimation of the stream miles filled in the study area. The inventories used in the EIS rely heavily on topographical maps that often do not map smaller headwater streams, despite their ecological importance. See Testimony of J. Bruce Wallace, Professor, University of Georgia, before the US Senate Committee on Environment and Public Works, June 6, 2002.



established for arriving at an environmentally "acceptable" amount of stream loss and it is "difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites."<sup>8</sup>

Attempts to minimize the downstream or "indirect" environmental impacts of valley fills are similarly unavailing. For example, available evidence strongly points toward valley fills causing significantly elevated levels of selenium, a highly toxic bioaccumulant. DEIS studies found elevated levels, with 66 violations of stream water quality criteria, below valley fills and none found at test sites without valley fills upstream.<sup>9</sup> In addition, the studies found that numerous other indirect impacts to streams, including the reduced ability of headwater streams to maintain their nutrient cycling function, increased sedimentation, reduced floodwater attenuation potential, and temperature changes, are of great concern. The Cumulative Impact Study found that "[f]or both direct and indirect impacts to ecological processes resulting from alterations in hydrologic patterns, [mountaintop removal and valley fills] would appear to be the major impact producing activity in the study area."<sup>10</sup>

Moreover, the DEIS shoves to one side the environmental implications of massive deforestation in Appalachia. The studies accompanying the DEIS found that when adding past, present and future terrestrial disturbances, the estimated area that will be stripped and flattened encompasses 1,408,372 acres of forest resources – which roughly equates to 11.5% of the entire study area,<sup>11</sup> – an area larger than the entire state of Delaware. The destruction of these nearly 1.5 million acres of some of the most diverse temperate forest in the country has widespread environmental, economic and social consequences for the region and the nation. It is extremely unlikely that even a small portion of this forest will be restored, and the timeline for even that minute level of restoration is hundreds, if not thousands of years.<sup>12</sup>

In evaluating whether there are significant impacts to the environment from mountaintop removal and valley fills, the primary authors of the DEIS ignore the catastrophic impact to wildlife that has already occurred or is projected to occur in the near term as documented in the appendices. For example, as is noted in the EPA's Cumulative Impact Study:

The southern Appalachians have been identified by the Nature Conservancy as one of the hot spot areas in the United States for rarity and richness. This region is known to have the highest regional concentration of aquatic biodiversity in the nation. For this reason, it is hypothesized that impacts which result in decreases in genetic diversity, as measured

<sup>8</sup> See MTM/VF EIS Steering Committee, "Problems Identified/Confirmed/Inferred by Technical Studies," August 15, 2002 working draft.

<sup>9</sup> EPA's stream chemistry study found that "The selenium data clearly show 'hot spots' with higher concentrations of selenium in each of the five watersheds [that were studied] and located downstream of 'Filled' sites ONLY. 'There are 66 violations of the stream water quality criteria identified and each is at a filled site. No other category of site had violations of selenium!'" Email from Gary Bryant (EPA WV) to William Hoffman (EPA Region 3), March 27, 2002 (capitalization and exclamation point in original).

<sup>10</sup> DEIS App. I at 75.

<sup>11</sup> DEIS IV.C-1.

<sup>12</sup> Email from Cindy Tibbott, FWS, re: MTM/VF EIS cumulative impact assessment, June 26, 2001 ("even if hardwood forests can be re-established, it should be intuitively obvious that they'll be a drastically different ecosystem from pre-mining forests for generations, if not thousands of years").

by loss of species, loss of populations or loss of genetic variants, would have a disproportionately large impact on the total aquatic genetic diversity of the nation.<sup>13</sup>

The Cumulative Impact Study further explains:

Riparian habitats are generally ecologically diverse and they often provide habitat for unique, or ecologically important species. The projected potential adverse impacts in the West Virginia study area is 7,591 acres, or 3.2%. Approximately 55% of the projected riparian habitat impacts occur in first and second order streams which are important habitats to many species of wildlife.<sup>14</sup>

[F]orest loss in the West Virginia portion of the study area has the potential of directly impacting as many as 244 vertebrate wildlife species.<sup>15</sup>

Assuming that 80% of the salamanders are lost in the projected forest impact areas, approximately 1,232,972,280 have the potential of being adversely impacted.<sup>16</sup>

The DEIS states that:

[T]his EIS describes biotic interactions common in headwater streams and various vertebrate species including birds, salamanders (including newts), and mammals which require interactions with the aquatic environment in order to maintain their life cycle... Filling would eliminate all aquatic and aquatic-dependant interactions that would formerly have occurred in the filled area. [T]he permanent nature of filling would suggest that MTM/VF impacts to biotic interactions in headwater stream systems may constitute a[n] irreversible impact to this system in the study area.<sup>17</sup>

The widespread deforestation of Appalachia will also have detrimental impacts on forest birds, particularly fragmentation-sensitive species including the cerulean warbler, Louisiana waterthrush, worm-eating warbler, black-and-white warbler and the yellow-throated vireo. The DEIS found that the potential adverse impact of loss of habitat for forest interior bird species "has extreme ecological significance in that habitats required by these species for successful breeding are limited in the eastern United States."<sup>18</sup>

As succinctly summarized in the Cumulative Impact Study:

Mountaintop mining and valley fill activities significantly affect the landscape mosaic. Landcover changes occur as forests are removed, the topography and hydrology is altered, and vegetation is eventually re-established. The result is an area drastically

<sup>13</sup> DEIS App. I, p.78.

<sup>14</sup> DEIS App. I, p. vi.

<sup>15</sup> Id. at 86.

<sup>16</sup> Id. at 92-93.

<sup>17</sup> DEIS IV.D-4 – 5.

<sup>18</sup> DEIS App. I, at 90 (emphasis added).

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different from its pre-mining condition. Soil qualities are different, the vegetative community has a different structure and composition, and habitats are altered.<sup>19</sup>

Finally, but no less importantly, the DEIS also downplays and dismisses the damage caused to the human communities living within the shadow of mountaintop removal operations.<sup>20</sup> For example, the blasting involved in mountaintop removal coal mining causes significant harm to local residents, including structural damage to their homes, excessive noise and dust, damage to wells, and psychological harm from the very real fear of flying rock and other debris. A report by West Virginia's legislative auditor found that "[c]itizens . . . could be living in hazardous conditions due to damage sustained in a blasting incident."<sup>21</sup> The DEIS admits that blasting "will continue to have periodic adverse effects on the quality of life of residents living in close proximity to the mine sites."<sup>22</sup> Yet, instead of evaluating reasonable steps that could be taken to reduce or eliminate these adverse effects, the DEIS cavalierly suggests that coalfield residents can file lawsuits to abate the nuisance.<sup>23</sup> This failure to address one of the important problems identified by local residents is not only illegal but also insulting to the communities who are forced to live near these mining sites.

In sum, the DEIS' conclusion that there is insufficient evidence to link mountaintop removal mining and valley fills with substantial and permanent environmental harm to streams, forests, wildlife and people is unsupported by the record and violates NEPA.

**B. The DEIS Must Consider Alternatives to Minimize the Environmental Impacts of Mountaintop Removal Coal Mining and Document the Impacts of Alternatives, Including the "Preferred Alternative"**

The May 2003 DEIS fails to conclude that mountaintop removal mining should be curtailed or that its impacts should be reduced, despite overwhelming evidence to the contrary provided by the DEIS' own studies. In fact, through the DEIS, the Bush administration is actually calling for easing existing environmental restrictions on this damaging mining method in direct contradiction to the findings of the scientific and technical studies.

The DEIS contains "four alternatives" – a "No Action" alternative that purports to maintain current regulatory programs, policies, and coordination processes<sup>24</sup> and three "Action" alternatives, each of which only considers making administrative changes in the permitting process. None of the "alternatives" considered in the DEIS would impose new limits or clear, objective, substantive restrictions on mountaintop removal operations.

<sup>19</sup> DEIS App. 1, at 23 (emphasis added).

<sup>20</sup> See DEIS III, W-1 *et seq.*, "Blasting and the Local Community."

<sup>21</sup> West Virginia Legislative Auditor, Preliminary Performance Review, "The Office of Explosives and Blasting Is Not Meeting All Required Mandates," p. 15-16 (December 2002).

<sup>22</sup> DEIS III W-6.

<sup>23</sup> *Id.*

<sup>24</sup> As noted below in Section C of these comments, even the so-called "No Action" alternative inexplicably contemplates amending the existing stream Buffer Zone rule.

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The Bush administration's "Preferred Alternative" in the DEIS suggests changes to "streamline" the permitting process and shuffle authority between the agencies – often in violation of federal law – while setting no meaningful limits on the size, location, or impacts of mountaintop removal operations, including valley fills. The DEIS' "Preferred Alternative" would attempt to combine the Surface Mining Reclamation and Control Act (SMCRA) and Clean Water Act (CWA) permitting processes in the name of bureaucratic efficiency. However, many of the intended benefits of both laws would be largely undermined by this proposed approach, which would give the OSM a greater role in Clean Water Act permitting decisions – a responsibility Congress entrusted to EPA, not the Office of Surface Mining. In addition, all of the DEIS alternatives assume the federal government will rewrite and weaken the SMCRA Buffer Zone rule, a long-standing law adopted to protect streams from coal mining activities.

The Bush administration's policy recommendations in the DEIS are completely at odds with the scientific studies. A January 2001 Preliminary Draft EIS<sup>25</sup> more accurately (though still imperfectly) reflected the Cumulative Impact Study's analysis of the effects on aquatic and terrestrial resources and species of several different scenarios for future mountaintop removal mining. The studies accompanying the Preliminary Draft EIS looked at alternatives including: 1) no limits on the size of valley fills, 2) a 250 acre limit, 3) a 150 acre limit, 4) a 75 acre limit and 5) a 35 acre limit on the size of fills.<sup>26</sup> Not surprisingly, the cumulative impact report found that the most restrictive alternative studied – the 35-acre limit – would result in the fewest environmental impacts on streams, forested areas, and species. The study noted that there would still be significant environmental damage even under this scenario, especially to headwater streams. Each of these preliminary alternatives assumed continuation of existing environmental protections, such as the stream Buffer Zone rule that limits mining damage within 100 feet of streams.

The Preliminary Draft EIS contained three action alternatives that restricted valley fills to ephemeral or intermittent streams and retained the 100-foot stream Buffer Zone (SBZ) rule, and a "No Action" alternative. The uncontrolled "No Action" scenario was shown to have the worst environmental impacts. Nonetheless, that is what the Bush administration essentially proposes in its May 2003 DEIS as the "Preferred Alternative" – a proposal that does not even consider, let alone recommend, any "bright line," objective acreage limits on valley fills. The May 2003 Bush administration "Preferred Alternative" also fails to propose an end to the use of Clean Water Act §404 general permits to authorize valley fills or any other meaningful limit on valley fills, regardless of whether an individual or general permit is used, despite the fact that limits on the size of valley fills is what the cumulative impacts study evaluated.

The May 30 DEIS itself confesses that there is little substantive difference between the alternatives considered. For example, the document states that "[a]ll alternatives . . . are based on process differences and not directly on measures that restrict the area of mining."<sup>27</sup> The DEIS states that "[t]he environmental benefits of the three action alternatives are very similar,"<sup>28</sup> and further acknowledges that "[t]he regulatory responsibilities . . . are common to all the

<sup>25</sup> Mountaintop Mining/Valley Fill EIS, Preliminary Draft, January 2001.

<sup>26</sup> Gainett-Fleming, "Landscape Scale Cumulative Impact Study of Future Mountaintop Mining Operations."

<sup>27</sup> DEIS IV.G-3 (emphasis added).

<sup>28</sup> DEIS II.B-13.

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alternatives . . . . However, the lead agency for each responsibility under the action could vary under each alternative."<sup>29</sup> The DEIS further admits that "[t]he proposed action alternatives are largely administrative and as a result, accurately projecting their environmental consequences is difficult."<sup>30</sup>

These stark but perhaps unavoidable admissions demonstrate that the DEIS does not really consider any real limitations on mountaintop removal or action alternatives that would minimize, to the maximum extent practicable, the environmental effects of this destructive mining practice.<sup>31</sup>

The dramatic shift from the Preliminary Draft to the May 2003 DEIS appears to be primarily due to the influence of the Office of Surface Mining (OSM) on the development of the EIS under the Bush administration. Under the previous administration, meaningful limits on the effects of mountaintop removal coal mining were at least being studied and considered. But in October 2001, J. Steven Griles, a former coal industry executive and lobbyist appointed to the post of Deputy Secretary of the U.S. Department of the Interior, issued a letter to the CEQ, Office of Management and Budget (OMB), EPA, and COE, stating in pertinent part:

We believe the [mountaintop removal/valley fill] EIS is the logical vehicle to address environmental protection and promote government efficiency, while meeting the nation's energy needs. . . . We do not believe that the EIS, as currently drafted, focuses sufficiently on these goals. We must ensure that the EIS lay (sic) the groundwork for coordinating our respective regulatory jurisdiction in the most efficient manner. **At a minimum, this would require that the EIS focus on centralizing and streamlining coal mine permitting, and minimizing or mitigating environmental impacts.**<sup>32</sup>

This was a none-too-subtle directive to the other federal agencies to shift the EIS's focus away from minimizing environmental effects in favor of permit streamlining and, at best, trying to "mitigate" the destruction of mountaintop removal, rather than avoiding it. A follow-up email from OSM's Mike Robinson explained to the other agencies that:

<sup>29</sup> DEIS ILC-25.

<sup>30</sup> DEIS IV, A-1.

<sup>31</sup> See also DEIS IV, A-5 ("The No Action Alternative and action alternatives will not eliminate the loss of stream segments and reduction in organic matter transported downstream"); DEIS IV, A-D7 ("There are no significant differences among the No Action Alternative and Alternatives 1, 2, and 3 in terms of their ability to protect [threatened and endangered] species"); DEIS IV, G-3 ("All alternatives may continue to displace local communities in essentially equal amounts, since the alternatives are based on process differences and not directly on measures that restrict the area of mining. . . . all alternatives will produce indistinguishable indirect impacts in this regard"); DEIS IV I-1 (Social Conditions) ("Since all of these actions would be implemented in Alternatives 1, 2, or 3, no distinction can be made between and among these alternatives as they affect social impacts").

<sup>32</sup> Letter from J. Steven Griles to CEQ, OMB, EPA, and COE re: Mountaintop Mining/Valley Fills Issues, October 5, 2001. It is worth noting that Mr. Griles is a former coal industry executive and lobbyist who continues to receive annual payments of \$284,000 per year from the sale of his former lobbying firm, National Environmental Strategies. When appointed to his present post, Mr. Griles sold his lobbying firm and signed a recusal agreement pledging that while at Interior he would not be involved in "any particular matter involving specific parties in which any of my former clients is or represents a party." Griles' former clients include many coal companies that conduct mountaintop removal mining, as well as the National Mining Association, the industry trade group and a vocal advocate for weakening federal environmental laws to benefit the coal industry.

OSM has received some **executive direction** from the Department of the Interior on a[n] overall theme for the EIS to embrace. . . . [T]he document was shared by Deputy Secretary Griles with many of the principals of our agencies this Monday at a meeting with the President's [CEQ].<sup>33</sup>

Other federal agencies involved in the EIS appeared both shocked and dismayed by this turn in events. Several inter-agency communications obtained by Trial Lawyers for Public Justice under the Freedom of Information Act indicate that the change in the EIS from studying ways to limit the environmental effects of mountaintop removal into an exercise in permit streamlining to benefit the coal industry was received as unexpected and ill-advised by the other federal agencies. For example, Dave Densmore of the U.S. Fish and Wildlife Service (which, like the Office of Surface Mining, is part of the Department of the Interior) stated in an October 11, 2001 e-mail to Mike Robinson that:

Needless to say, this is not a shining example of our Department having "spoken with one voice," since I can find no evidence of anyone at FWS having reviewed or concurred with this approach. Regardless, based on my initial review, **I find I cannot support this approach, if for no other reason than the record having amply demonstrated that it has been the absence of federal oversight, not its confounding influence, that has gotten us in the fix we are in now.**<sup>34</sup>

This "all process, no substance"<sup>35</sup> approach was sharply criticized by others involved in developing the programmatic EIS. In a revealing internal critique, the FWS explained why the revised framework for the DEIS is completely inadequate:

Now that the basic concept has been more fully elaborated . . . it is **painfully obvious to us that there are no differences between the three action alternatives that can be analyzed in a NEPA context.** Table IV-2 (Comparison of Alternatives) underscores this fundamental shortcoming. Each of the three action alternatives offers only meager environmental benefits (thus a "two-star rating," as with a budget hotel or B movie), and there is no difference between them – even in their degree of meagerness. The relative economic effects of these alternatives are similarly indistinguishable. The reader is left wondering what genuine actions, if any, the agencies are actually proposing.<sup>36</sup>

Apparently, the FWS was not the only agency that harbored such concerns. One week before the DEIS was issued, an EPA briefing statement anticipated that a major issue raised by the public

<sup>33</sup> Email from Mike Robinson, OSM, re: EIS Direction, October 10, 2001, (emphasis added).

<sup>34</sup> Email from Dave Densmore, FWS, re: EIS Direction, October 11, 2001.

<sup>35</sup> It is important to note that the only "substantive" changes proposed in the DEIS would weaken existing environmental standards, such as the Buffer Zone rule. See Section C, below.

<sup>36</sup> Email from Dave Densmore re: FWS Comments on Chapter IV, with Attachment: FWS Comments on 9/20/02 Draft of Chapter IV (Alternatives), September 30, 2002 (emphasis added).

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would be: "Process v. Environmental Protection: Where's the meat? What is being proposed that will improve environmental protection? What proposals will place limits on MTM/VF?"<sup>37</sup>

Not only did the DEIS approach fail to meet the requirements of the original scope intended for the programmatic EIS, it completely ignored the millions of dollars and thousands of pages of technical and scientific studies that the agencies' staff had been working on for years. As aptly explained by the FWS's Mr. Densmore:

The EIS technical studies carried out by the agencies -- at considerable taxpayer expense -- have documented adverse impacts to aquatic and terrestrial ecosystems, yet the proposed alternatives presented offer no substantive means of addressing these impacts. **The alternatives and actions, as currently written, belie four years of work and the accumulated evidence of environmental harm, and would substitute permit process tinkering for meaningful and measurable change.**<sup>38</sup>

The DEIS' failure to address meaningful alternatives disregards the findings of the studies on mountaintop removal and flies in the face of common sense -- and it clearly violates the law governing the EIS process, the National Environmental Policy Act ("NEPA").<sup>39</sup> NEPA requires that Environmental Impact Statements describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented."<sup>40</sup> NEPA implementing regulations make clear that an EIS must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public," and to "rigorously explore and objectively evaluate all reasonable alternatives."<sup>41</sup>

NEPA's requirement that federal agencies evaluate all reasonable environmentally distinguishable substantive alternative to agency actions and to fully evaluate the consequences of these alternatives is flatly violated by the mountaintop removal DEIS. The three "action alternatives" in the DEIS are purely process alternatives; they provide no meaningful basis for analyzing, much less reducing, the environmental impacts of continued federal approval of mountaintop removal operations. By failing to consider reasonable alternatives that would restrict the size, scope, and number of valley fills, the DEIS fails to consider a reasonable range of alternatives, as NEPA requires.

<sup>37</sup> Email from John Forcen re: Briefing Outline, with Attachment: Briefing, Mountaintop Mining/Valley Fills (MTM/VF) Draft Programmatic Environmental Impact Statement, May 21, 2003.

<sup>38</sup> Email from Dave Densmore re: FWS Comments on Chapter IV, September 30, 2002 (emphasis added).

<sup>39</sup> 42 U.S.C. § 4321 *et seq.* NOTE: This section only addresses a few of the many ways the DEIS violates NEPA statutory and regulatory requirements; it is not meant to be a comprehensive evaluation of all NEPA violations evidenced by this DEIS.

<sup>40</sup> 42 U.S.C. § 4332(2)(C).

<sup>41</sup> 40 C.F.R. § 1502.14 (emphasis added).

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In addition, NEPA requires that an EIS accurately portray the impacts of the proposed action, and alternatives to the proposed action.<sup>42</sup> NEPA requires that an EIS prepared by a federal agency include "a detailed statement" on "the environmental impact of the proposed action, ... any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action."<sup>43</sup>

The alternatives analysis, including discussion of the proposed action is "the heart of the environmental impact statement."<sup>44</sup> The analysis, based in large part upon the environmental consequences section of the EIS, should "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."<sup>45</sup>

The environmental consequences section of the EIS "forms the scientific and analytic basis" for the required comparison of alternatives; this section must contain discussions of, *inter alia*, "direct effects and their significance, indirect effects and their significance," and "environmental effects of alternatives including the proposed action."<sup>46</sup> Effects that must be analyzed include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative."<sup>47</sup> Direct effects "are caused by the action and occur at the same time and place."<sup>48</sup> Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."<sup>49</sup> Cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."<sup>50</sup>

The mountaintop removal DEIS fails in this regard. According to claims made in the document, the "Preferred Alternative" -- Alternative 2 -- would, like the other "action" alternatives considered, result in "significant environmental benefits"<sup>51</sup> but this assertion is not backed up with any description of or factual information about what those benefits would actually be. At best, the DEIS further asserts that the coordinated permit process that comprises Alternative 2 might result in the identification of ways that could be used on a case-by-case basis to avoid or minimize adverse effects, but nowhere in the document do the agencies actually identify any actual resources that would be protected -- at individual sites or on a cumulative basis -- as a result of the selection of their preferred alternative.<sup>52</sup>

<sup>42</sup> 42 USC 4332 (NEPA 102(C & E)); 40 CFR 1502.14, 1502.16; 40 CFR 1508.8.

<sup>43</sup> 42 USC 4332 (NEPA 102(C)) (emphasis added).

<sup>44</sup> 40 CFR 1502.14.

<sup>45</sup> *Id.*

<sup>46</sup> 40 CFR 1502.16.

<sup>47</sup> 40 CFR 1508.8.

<sup>48</sup> 40 CFR 1508.8(a).

<sup>49</sup> 40 CFR 1508.8(b).

<sup>50</sup> 40 CFR 1508.7.

<sup>51</sup> DEIS II, B-17.

<sup>52</sup> See DEIS II, Section C "Detailed Analyses of the Actions to Address Issues." The title of this section is misleading in the sense that it contains no detailed analysis of the actions, including the preferred alternative.

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Perhaps even more importantly, the DEIS fails to describe (either in detail or in general terms) the environmental resources that would be harmed under the agencies' preferred alternative. For example, the DEIS does not discuss the direct, indirect, or cumulative effects of Alternative 2 on stream losses, the consequential size of valley fills, future forest losses, effects on fish and wildlife resources, including endangered species, flooding or other environmental damage associated with mountaintop removal coal mining.<sup>53</sup>

This omission in the DEIS itself is especially striking, given that the scientific studies contained in the appendices so vividly describe the environmental destruction that has been and currently is being caused by mountaintop removal. As the Cumulative Impact Study makes clear, without new restrictions on mountaintop removal, these impacts are likely to double over the next decade. Yet, the DEIS itself contains none of the detailed analysis NEPA requires saying what impact – if any – the proposed action alternative would have on the future of these resources.<sup>54</sup>

Thus, a decision-maker reading the DEIS would not be able to figure out from this document that the federal action at issue is one that is destroying an environmentally sensitive area the size of one of the 50 United States (and not even the smallest one) – violating the very purpose of the NEPA analysis.

#### C. Elimination of Existing Protections, Such as the Buffer Zone Rule, Are Not Reasonable Alternatives

One of the most important components of current SMCRA law is the so-called buffer zone rule. This regulation, adopted in 1983 by the Reagan administration, prevents the OSM and state agencies from issuing permits for coal mining activities that would disturb land within 100 feet of streams, unless the permitting agency affirmatively confirms that the activities will not violate

<sup>53</sup> *Id.* In addition, under basic principles of administrative law, the agencies must do more than merely make the prescribed determinations but must support its determinations with substantial evidence. The D.C. Circuit has held that Administrative Procedure Act § 706(2)(A), which provides for reviewing courts to “hold unlawful and set aside” agency actions found to be arbitrary or capricious, “enabl[es] the courts to strike down, as arbitrary, agency action that is devoid of needed factual support.” *Assn. of Data Processing v. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (emphasis in original; internal quotations and ellipsis omitted). Under this standard, the agencies must offer credible evidence, not mere speculation, to buttress factual conclusions. *See, e.g., Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir. 2001) (remanded where agency had failed to “demonstrate[]” relevant point with “substantial evidence – not mere assertions”); *Edison Electric Inst. v. USEPA*, 2 F.3d 438, 446 (D.C. Cir. 1993) (agency’s purported “justification on the record” rejected where it “consists of speculative factual assertions”); *Chemical Mfrs. Assn. v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (same); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1187-88 (D.C. Cir. 1996) (“the law requires more than simple guesswork”); *Air Transport Assn. v. FAA*, 254 F.3d 271, 279 (D.C. Cir. 2001) (agency “failed to provide any record justification” for a key assertion, but instead “simply assumed it was so”).

<sup>54</sup> Under the arbitrary and capricious standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). An agency action can be arbitrary and capricious “if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Ass’n v. State Farm Mut.*, 463 U.S. 29 (1983).

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water quality standards and will not adversely affect water quantity, quality, or other stream resources.<sup>55</sup> This regulation is needed to implement the provisions of SMCRA that require the protection of water courses from mining damage.

Remarkably, all of the “alternatives” considered in the DEIS propose (or assume) that the Buffer Zone rule will be rewritten by the Bush administration to allow coal mining waste to be dumped into streams, burying them – essentially eliminating the stream “buffer” from the Buffer Zone rule. This is perhaps the most outrageous part of the DEIS. While the document overall fails to live up to the purpose of finding ways to minimize the already devastating effects of mountaintop removal by ignoring alternatives needed to limit the impacts of this form of mining, the proposal to eliminate the Buffer Zone rule actually would increase the harm caused by mountaintop removal by removing from law an important and long-standing limit on coal mining activities.<sup>56</sup>

As noted above, the 1983 Buffer Zone rule protects streams from coal mining activities. In relevant part, the rule states that:

- (a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—
- (1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream[.]<sup>57</sup>

The Bush administration’s proposal, as distributed to regional groups in March 2003<sup>58</sup> would change the existing rule to state that:

- (a) General. You must first obtain specific approval from the regulatory authority before conducting surface mining activities within 100 feet of a perennial or intermittent stream. Except as provided in paragraph (b), the regulatory authority may authorize such activities only after making a written finding that the activities will—
- (1) Not cause or contribute to a violation of applicable State or Federal water quality standards.
- (2) Be conducted to minimize disturbances to the quantity and quality of water in the stream. This finding need not be made with respect to any reach of the stream that is

<sup>55</sup> 30 CFR § 816.57.

<sup>56</sup> All four of the alternatives considered in the DEIS, including the so-called “no action alternative,” contemplate changes to the existing Buffer Zone rule that would either weaken (“no action alternative”) or explicitly (alternative 1) or implicitly (alternatives 2 and 3) eviscerate the rule. The DEIS therefore frustrates Congressional will and illegally evades the requirements of NEPA to consider “the alternative of no action” and compare the benefits of stream protection as it exists with any changes in existing law.

<sup>57</sup> 30 CFR § 816.57 (emphasis added).

<sup>58</sup> See Office of Surface Mining “Outreach Document: Planned Rulemaking to Clarify Excess Spoil/Stream Buffer Zone Requirements,” March 21, 2003.

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upstream of a sedimentation pond located within the stream channel, provided that the pond meets the location requirements of § 816.46(c)(1)(ii) of this part.

(3) Be conducted in a manner that minimizes disturbances and adverse impacts to fish, wildlife, and related environmental values of the stream.

(b) **Placement of excess spoil in perennial or intermittent streams.** The findings required in paragraphs (a)(1)-(3) do not apply to the construction of excess spoil fills in perennial or intermittent streams. To approve construction of fills in these streams, the regulatory authority must find that the applicant has—

(1) Minimized the creation of excess spoil to the maximum extent practicable as required under § 780.18(b)(3) of this chapter and § 816.102(b) of this part; and

(2) Designed the fill to avoid or minimize adverse impacts to perennial or intermittent streams to the extent required under § 780.16(c) of this chapter and § 816.97(f) of this part.

The proposed replacement of the Buffer Zone rule would obviously and specifically change the law to allow the dumping of coal mining spoil directly into these previously protected streams, with the only requirement being that the mining companies have “minimized the creation of excess spoil to the maximum extent practicable.” This rule change would effectively remove the “buffer” from the buffer zone rule to create an illegal and unwarranted exception allowing coal companies to bury streams under valley fills.

The DEIS acknowledges that this change in the stream Buffer Zone (“SBZ”) rule is in the works, but does not address the environmental effects that this change in law will have on the future of mountaintop removal coal mining. The DEIS states that:

**OSM is currently preparing a draft proposed rule that would amend the rules at 30 CFR 816.57 and 817.57 to clarify the SBZ requirements . . . . Exemptions to the SBZ requirements** would only be granted upon a demonstration by the coal operator, to the satisfaction of the SMCRA regulatory authority, that encroachment into the SBZ is necessary and that disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas have been minimized.<sup>59</sup>

The DEIS’ explanation for the proposal to eliminate the buffer from the Buffer Zone rule for valley fills is on its face nonsensical. The DEIS’ rationale ignores the existing rule’s plain meaning and is seemingly ignorant of the interpretation of the Buffer Zone rule by previous administrations.

The DEIS claims that applying the stream buffer zone rule under SMCRA to prohibit fills in intermittent and perennial streams would be inconsistent with existing Clean Water Act

<sup>59</sup> DEIS II C-34 to C-35 (emphasis added). See also, DEIS II B-7, regarding the “No Action Alternative” (“OSM initiated a SMCRA regulatory program enhancement to amend and clarify the stream buffer zone (SBZ) rules at 30 CFR 816.57 and 817.57”); DEIS II B-19, regarding the “No Action Alternative” (“SMCRA buffer zone (SBZ) subject to interpretation”); DEIS II C-1, regarding the “No Action Alternative” (“Current SBZ rule-making (OSM)”); DEIS II D-2, regarding “Alternatives Considered but Not Carried Forward in this EIS,” (“Use of the [existing] OSM SBZ rule was considered to implement the alternatives establishing valley fill restrictions for certain stream segments [but not carried forward]”).

requirements allowing valley fills<sup>60</sup> and would therefore violate section 702 of SMCRA, which provides that SMCRA does not supercede, amend or repeal the Clean Water Act.<sup>61</sup>

In describing the proposed changes to the Buffer Zone rule in the so-called “No Action Alternative,” the DEIS states:

Historically, OSM has not viewed, applied, or enforced the buffer zone regulation to prohibit mining activities within the buffer zone if those activities would have less than a significant effect on the overall chemistry and biology of streams, i.e., the overall watershed or stream below the activity. Therefore, excess spoil fill construction within the buffer zone has been allowed if a demonstration of no significant effect on downstream water quality was made by the permit applicant to the satisfaction of the SMCRA regulatory authority.<sup>62</sup>

The DEIS’ argument is flatly inconsistent not only with the text of the current rule, but also with the position taken by the United States in the litigation that actually was the source of this DEIS in the first place, *Bragg v. Rivenburgh*. In its brief in the 4<sup>th</sup> Circuit in that case, the United States argued that:

SMCRA section 702 provides merely that SMCRA does not alter the existing regulatory schemes adopted by Congress in the [Clean Water Act] and other environmental statutes. . . . When Congress has intended that one statute should take precedence over another statute in the regulation of a particular activity, it has done so with language very different and much clearer than SMCRA section 702. . . . While WVDEP has asserted that it would create an impermissible statutory “conflict” to read the buffer zone rule to establish a stricter standard than that established by the 404(b)(1) guidelines, such a statutory construction does not create any such “conflict” as that term is understood in the law. As the Supreme Court has held, two statutes can be said to conflict only when it is impossible to comply with both. **No such conflict arises if SMCRA is construed to prohibit some activities that would be authorized by the CWA, since it is possible to comply with both statutes by engaging in only those activities authorized by both statutes**.<sup>63</sup>

Thus, OSM’s interpretation of the existing Buffer Zone rule in the DEIS is incorrect, and is directly inconsistent with the interpretation given by the United States before the 4<sup>th</sup> Circuit in *Bragg*. In addition, EPA’s Office of Water warned OSM in December, 2002 that the DEIS’ legal position on the Buffer Zone rule is incorrect, commenting that:

<sup>60</sup> This argument is especially cynical and disingenuous given that in May, 2002, the Bush administration rewrote 25-year-old Clean Water Act regulations prohibiting the disposal of waste material – including mountaintop removal waste – from being dumped in streams in an attempt to allow such waste disposal in waters to occur.

<sup>61</sup> DEIS II D-2. See 30 U.S.C. § 1292(a)(2).

<sup>62</sup> DEIS II C-34.

<sup>63</sup> Brief for the Federal Appellants, 4<sup>th</sup> Cir., No. 99-2683, April 17, 2000, pp. 45-49 (emphasis added) (internal citations omitted).

There are fairly sweeping legal conclusions here that the stream buffer zone rule could not be used to determine allowable stream segments for filling because doing so would supercede the CWA, something [C]ongress precluded in SMCRA. The lawyers need to look at this more closely. I'm uncomfortable with the breadth of this argument...<sup>64</sup>

The DEIS' interpretation of the Buffer Zone rule, as supplied by OSM, is erroneous as a matter of policy and of law, and is an arbitrary reversal of the prior position taken by the U.S. government before the federal courts.

All of the alternatives considered in the DEIS, including the "No Action" alternative and the three "action alternatives," contemplate changing the Buffer Zone rule so that the rule is weakened or eviscerated. No alternative contemplates keeping the Buffer Zone rule in place as it currently exists. This failure to consider any alternative which includes the option of not changing current law violates NEPA, under which the EIS must "[i]nclude the alternative of no action."<sup>65</sup> By illegally including a rule change in the "No Action" alternative, the DEIS attempts to evade a fundamental requirement of NEPA to consider the benefits of reasonable alternatives, including the alternative of leaving the law unchanged. Rather, the DEIS assumes that under all alternatives spoil can be placed in streams and contains no analysis of the benefits of maintaining the current level of protection afforded by the Buffer Zone rule. Further, the DEIS' assumption that changing the Buffer Zone rule is part of the "no action alternative" violates SMCRA, which requires OSM to prepare an EIS on significant changes to the SMCRA regulations.<sup>66</sup>

#### D. The DEIS' Proposed Continued Reliance on the Use of Nationwide Permits for Valley Fills Is Illegal

The DEIS perpetuates the Corps' longstanding violation of the Clean Water Act, by relying upon issuance of general Nationwide Permits to authorize valley fills from mountaintop removal mining operations. All of the proposed alternatives discussed in the DEIS include the continued use of nationwide permits for future authorizations of valley fills.

Section 404(e) of the Clean Water Act authorizes EPA and the Army Corps to issue general permits for the discharge of dredged or fill material for categories of activities that are "similar in nature" when the discharges that will be permitted under the permits will cause "only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effect on the environment."<sup>67</sup>

Currently, the Army Corps relies upon Nationwide Permit 21 (NWP 21), an overly-broad general permit that encompasses "Surface Coal Mining Activities," to authorize mountaintop removal mining valley fills to bury streams throughout Appalachia. Virtually every valley fill that has

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been permitted by the Army Corps in Appalachia has been pursuant to a nationwide general permit, as opposed to individual permits under the Clean Water Act.

Studies estimate that, over the last 10 years, mountaintop removal has already caused direct impacts to more than 1,200 miles of streams, including an estimated 724 stream miles that were covered by valley fills from 1985 to 2001.<sup>68</sup> The studies confirm that "[i]f mining permitting and mitigation trends stay the same, an additional thousand miles of direct impacts could occur in the next ten years. The majority of streams impacted are headwater streams."<sup>69</sup> These estimates are only for direct impacts to streams (i.e., the streams are buried or otherwise destroyed) and do not take into account the "indirect impacts" on streams such as elevation of selenium levels as well as changes to stream chemistry, temperature, flow, energy, sedimentation, or biota. The studies conclude that such effects may be irreversible, noting that: "[s]tudies seem to suggest that the impacts to the aquatic community downstream from fills may result from water quality impacts due to filling which may be extremely difficult or impossible to correct."<sup>70</sup>

In addition, the studies accompanying the DEIS document the enormous cumulative terrestrial impacts already caused by the sweeping deforestation that is part and parcel of mountaintop removal mining.<sup>71</sup> Besides those forests destroyed directly in order to access seams of coal below the mountaintops, those forests located down in the valleys that are filled are also extinguished, along with the wildlife that rely upon them. But for the general permits issued allowing "valley fills" under the Clean Water Act, many of these forests and their associated wildlife would not be destroyed. As noted above, the destruction of these streams, forests, and associated wildlife is, for the most part, irreversible.

The DEIS studies clearly establish that greater than minimal adverse environmental effects have occurred, are occurring and will continue to occur as a result of mountaintop removal mining valley fills. Many of the authorized fills cause greater than minimal adverse effects individually, and there can be no question that the cumulative impacts of valley fills have already exceeded the "minimal adverse effects" threshold established by the Clean Water Act. Thus, no additional general permits for valley fills may be issued by the Army Corps, nor can existing general permits be relied upon to authorize such fills, or as a basis for considering alternatives under the DEIS.<sup>72</sup>

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<sup>68</sup> DEIS, ES-4.

<sup>69</sup> DEIS, App. 1 at 67.

<sup>70</sup> *Id.* at 75.

<sup>71</sup> As noted above, the Clean Water Act prohibits the issuance of general permits to fill waters when the activity will have more than a "minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e) (emphasis added). Thus, the analysis of the harm caused by the activity proposing to discharge pollutant into water is not limited to the harm caused only to the aquatic environment, but necessarily consider the harm that would result to the environment generally, including the terrestrial environment.

<sup>72</sup> We hereby incorporate by reference additional reasons why the continued use of NWP 21 violates the Clean Water Act as stated in NRDC's October 2001 comments on the NWP proposal published in the Federal Register at 66 Fed. Reg. 42070 (August 9, 2001).



**E. The DEIS' Mitigation Analysis Is Fundamentally Flawed Because Burial of Streams Cannot Be Mitigated.**

The DEIS further violates NEPA by failing to adequately analyze the effectiveness of proposed mitigation measures. Specifically, the DEIS wrongly relies on the effectiveness of in-kind mitigation to justify failure to recommend other stream protection measures<sup>73</sup> despite the fact that the DEIS and its accompanying studies admit that on-site headwater stream reconstruction has never been successfully accomplished and that the technology to reconstruct free-flowing streams does not even exist. Thus, there is no rational basis for the DEIS' reliance upon stream mitigation as a method of reducing impacts of mountaintop removal mining to an environmentally acceptable level.

The DEIS states that "[m]itigation for lost stream functions is important to ensure that significant degradation to waters of the U.S. does not occur"<sup>74</sup> and that "[i]n-kind mitigation must restore or create headwater stream habitat on the reclaimed mine area to replicate the functions lost from direct stream loss."<sup>75</sup>

The Fish and Wildlife Service's reviewer of the DEIS has commented that "...the ability of compensatory mitigation to reduce impacts to minimal levels is the linchpin of each of the alternatives" but that such mitigation for buried streams "is an untested, unproven concept, and many believe it can't be accomplished."<sup>76</sup>

The DEIS states: "[w]hile proven methods exist for larger stream channel restoration and creation, the state of the art in creating smaller headwater streams onsite has not reached the level of reproducible success required for these efforts to be reasonably relied upon programmatically as an option for full compensatory mitigation."<sup>77</sup> And elsewhere: "[d]uring the development of this EIS, technical representatives from OSM and from West Virginia have suggested that groin ditches constructed along the edges of fills may represent an opportunity for in-kind replacement of streams with an intermittent or ephemeral regime. To date, no drainage structures observed appear to have successfully developed into a functional headwater stream."<sup>78</sup>

While it is true that NEPA does not require an agency to mitigate adverse environmental impacts, where, as here, "an agency's decision to proceed with a project is based on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation measures, the decision must be set aside as 'arbitrary and capricious.'"<sup>79</sup>

<sup>73</sup> DEIS II.C-23 (stating that burial of streams by valley fills "can be successfully offset by a comprehensive mitigation proposal").

<sup>74</sup> DEIS II.C-49.

<sup>75</sup> DEIS IV.B-9.

<sup>76</sup> Email from Cindy Tibbott, FWS, re: Chapters I & II comments, November 13, 2002.

<sup>77</sup> DEIS II.C-50.

<sup>78</sup> DEIS III.D-18 - D-19.

<sup>79</sup> *Stein v. Barton*, 740 F. Supp. 743, 753-54 (D. Alaska 1990) (conclusion that mitigation "will prevent any significant reduction in fish habitat" was arbitrary in light of evidence in the record demonstrating mitigation failures).

In short, the mountaintop removal DEIS relies upon mitigation "alternatives" that have little basis in reality, and no credible prospect of success. Accordingly, the DEIS cannot satisfy NEPA's requirements for a proper alternatives analysis.

**F. The Economic Impact of Reducing the Size of Valley Fills Would Be Minimal**

The failure to consider new restrictions on mountaintop removal - especially objective limits on the size of valley fills - cannot be justified on economic grounds. Studies prepared for the DEIS concluded that limits on valley fills would not only have significant environmental benefits, but also that the economic consequences would be moderate, or relatively insignificant. Even after the first economic study was rewritten for the DEIS in order to be more sympathetic to the coal industry's concerns, the second version of the study concluded that the economic costs would be small.

As part of the programmatic EIS effort, EPA contracted with Hill & Associates (H&A), an economic modeling firm, to model the economic impacts of the various alternatives - still under consideration at that time - for restricting the size of valley fills. In a December 2001 "final" report to EPA, H&A concluded that even the most severe restriction on valley fills studied in the report - one that barred fills covering watersheds more than 35 acres - would raise the price of coal by only \$1 per ton and raise the cost of electricity by a few cents per megawatt-hour.<sup>80</sup> In a March 2002 slide show presentation to senior EPA officials in its Washington, D.C. headquarters, EPA Region 3 officials characterized these effects as "a minimal impact on the price of coal" and "virtually NO impact on electricity prices."<sup>81</sup> The presentation revealed that:

- Sufficient coal reserves appear to exist under the 250, 150, 75, and 35-acre restriction scenarios necessary to meet demand during the 10 year study period . . .
- Restricting valley fills to 250, 150, 75, or 35-acre watersheds will increase the price of coal by only \$1/ton under each respective restriction scenario.
- Restricting valley fills to 250, 150, 75, or 35-acre watersheds will increase the price of electricity by only a few cents/MWhr under each respective restriction scenario.<sup>82</sup>

Another EPA draft study, dated April 23, 2002, concludes that, even under the most restrictive option studied - limiting the size of valley fills to 35-acre watersheds - annual average impacts to total statewide employment in Kentucky and West Virginia are no more than 0.3% of total year 2000 employment. In addition, this study found that there are no "notable differences in [wholesale electricity] prices or generation levels among the alternative [restrictions] . . . due to the competitive nature of the energy markets."<sup>83</sup>

<sup>80</sup> Hill & Associates, "Economic Impact of Mountain Top Mining and Valley Fills, Environmental Impact Statement," for U.S. EPA, December 2001. The H&A study assumed that valley fill restrictions would apply immediately to all existing mines, while a more likely scenario is that new restrictions would only apply to future permits. Thus the study overstates the likely economic impacts of limiting future Clean Water Act § 404 permits to dump mountaintop removal waste into waters.

<sup>81</sup> Mountaintop Mining EIS Presentation, EPA Office of Water, Office of Federal Activities, and Office of General Counsel, March 5, 2002 (emphasis in original).

<sup>82</sup> *Id.*

<sup>83</sup> Gannett Fleming, *Draft Economic Consequences Study for MTM/VF EIS*, April 23, 2002.

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Apparently because the coal industry was unhappy with the conclusions of the first "final" report, Hill & Associates was directed to reopen their study by conducting a "sensitivity analysis" that consisted mostly of interviewing coal company officials to incorporate their opinions of the economic effects of limiting the size of valley fills.<sup>84</sup> Even with this industry input, the economic consequences of limiting the size and location of valley fills was found to be minimal.

Thus, the May 30 DEIS finds that "in most situations the restriction would change the price of coal to less than one dollar per ton," and "[t]he price of electricity would continue to rise approximately 1 to 2 percent across the scenarios, the impacts due to restrictions will have little effect on price."<sup>85</sup> Even after adjusting the models based on the coal industry's inputs, the change in the price of coal rose to only two dollars a ton.

Morgan Worldwide Consultants, Inc. (MWCI) conducted an analysis of the economic reports. As OSM's Mike Robinson observed in a January 2003 e-mail, the MWCI analysis concluded "... it is evident that the electricity prices are quite insensitive to the MTM/VF restrictions, showing differences of only 1%-2%, or 3% at the maximum."<sup>86</sup> Perhaps recognizing this might be a public relations issue for the agencies – since no other reason to avoid limiting the size of valley fills had been produced – a background memo for the agencies' "Communications Team" dated January 16, 2003, warns that "[a]s part of the studies conducted in conjunction with the DEIS were studies to assess the economic impacts that would result from implementing actions considering limits on the size of valley fills. Information from the economic studies ... suggest that limits on the size of fills will have only minimal economic consequences on coal and electricity prices."<sup>87</sup>

Therefore, one of the coal industry's – and this administration's – primary rationales for failing to rein in the worst abuses caused by mountaintop removal coal mining is refuted by its own economic studies.

#### Conclusion

The environmental and economic studies prepared for the mountaintop removal programmatic EIS do not lend any support to the administration's proposed "Preferred Alternative" that would

<sup>84</sup> Although the "Phase II" H&A study states that stakeholder meetings were held with "members of the environmental community, representatives from academia, governmental agency personnel, and technical representatives from the coal mining industry," under the heading "Findings from Individual Stakeholder Meetings" the report states that "[s]hortly after the initial 'kickoff' meeting of this project, a team of technical specialists from Hill & Associates made separate visits to individual coal mining companies to research actual 'on-the-ground' impacts experienced and projected due to valley fill restrictions. Coal producers representing approximately 60% of the affected surface mine tonnage in southern West Virginia and eastern Kentucky were visited." DEIS, App. G "Phase II Study" at 6.

<sup>85</sup> DEIS App. G, p. 6 (summary of Phase II Economics study by Hill and Associates) (emphasis added).

<sup>86</sup> Email from Mike Robinson re: H&A economic analysis, citing Letter from Morgan Worldwide Consultants, Inc., January 10, 2003.

<sup>87</sup> Mountaintop Mining / Valley Fill DEIS Background Information for Communications Team, January 16, 2003, p. 2 (emphasis added).

result in the weakening of existing environmental laws that limit the size and location of valley fills. In fact, the studies support the opposite conclusion: mountaintop removal must be much more strictly limited to head off additional and significant devastation of the Appalachian region's natural resources – and the communities that depend on those resources now and for future generations.

The DEIS represents a wholesale retreat from the promise made by the federal government in 1998, when the agencies involved pledged to develop a programmatic EIS to minimize to the maximum extent practicable the environmental harm caused by mountaintop removal and valley fills – not prolong or exacerbate the problem. The DEIS also violates or calls for changes in long-standing environmental protections that would violate numerous federal environmental laws, including the National Environmental Policy Act, the Clean Water Act, and the Surface Mining Control and Reclamation Act.

As stated above, the DEIS must be rewritten to consider substantive alternatives that would minimize the environmental harm caused by mountaintop removal and select a preferred alternative that would truly protect the resources and people of the region.

Sincerely,

Joan Mulhern  
Senior Legislative Counsel  
Earthjustice

Fred Sampson  
President  
West Virginia Environmental Council

Melissa Samet  
Senior Director, Water Resources  
American Rivers

John Blair  
President  
Valley Watch, Inc.

Ed Hopkins  
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Potomac Valley Audubon Society

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P.O. Box 578  
Shepherdstown, WV 25443

REC'D DEC 31 2003

December 26, 2003

Mr. John Forren  
U.S. EPA (3A30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

Regarding: Mountaintop Removal and Valley Fills

I am writing this letter on behalf of the Potomac Valley Audubon Society. We are a Chapter of the National Audubon Society with a membership of approximately 600 members in the eastern panhandle counties of West Virginia.

The Potomac Valley Audubon Society (PVAS) is opposed to mountaintop removal and valley fills. The Clean Water Act and Surface Mining Laws require the government to prohibit the use of valley fills and mountaintop removal.

Scientific studies document the widespread and irreversible damage that mountaintop removal and valley fill is having on Appalachia, but yet the Environmental Impact Statement (EIS) rejects the science based restrictions related to the size of the fill, cumulative impacts, types of streams affected, and value of the aquatic resources in the region.

We specifically oppose any changes that would weaken the laws and regulations that protect clean water. In particular, we oppose the proposed elimination of the stream buffer-zone rule that prohibits mining activity within 100 feet of streams. This rule should be strictly enforced. We do not support Alternative 1, 2 or 3 as described in the EIS report. These options do not protect Appalachian forests, water, or communities.

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We value the aquatic resources, biologically rich forest and stream ecosystems, the streams themselves, and our drinking water. Moreover, no wildlife habitat destruction studies have been forthcoming in this matter, and the impact of MTR on all wildlife is unknown. Leveling mountains and burying streams needs to stop and these issues need to be more fully evaluated.

Very truly yours,

Diana L. Mullis  
President

REC'D DEC 31 2003

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December 20, 2003

Coal River Mountain Watch  
Post Office Box 651  
Whitesville, West Virginia 25209

Mr. John Forren  
United States Environmental Protection Agency  
1650 Arch Street  
Philadelphia, Pennsylvania 19103

To Whom It May Concern:

Coal River Mountain Watch is a local grassroots organization dedicated to protecting the heritage and environment of the West Virginia coalfields while also promoting vibrant and sustainable communities. Our members and staff all have deep personal connections to the mountains of West Virginia. Virtually all of our staff and members have personal connections to the coal industry.

Our organization feels it is tragic that the hard working miners and families of this region have been forced to believe they must destroy the physical and social fabric of our communities in order to make a living. We firmly believe that this situation is not accidental, nor is it the inevitable outcome of economic circumstances. The chronic economic problems of central Appalachia are the result of extractive industry's economic dominance over the region, and mountaintop removal coal mining is its poster child. The people of central Appalachia are hunters, fishermen, farmers and woodsmen in addition to coal miners. It is truly a shame that people have to choose between feeding their families and destroying an ancestral hunting ground. If other employment opportunities existed in our region, we believe our people would take them rather than flatten their mountains and forests.

Against this regional and organizational background, Coal River Mountain Watch offers the following comments on the Draft Environmental Impact Statement on Mountaintop Removal / Valley Fill coal mining:

Though the EIS is an enormous document that includes many detailed scientific studies, we believe the fatal flaw in the statement is readily apparent in the executive summary. This flaw is in the very structure of the statement and reveals the influence of the industry in the preparation of the document. Unfortunately, this flaw undermines the hard work of the scientists employed by the study.

Following standard procedure for an EIS, the "no action" alternative would make no changes to the existing practice of mountaintop removal coal mining. Coal River Mountain Watch adamantly argues that for the EIS to be a credible document, the abolition of mountaintop removal must be vigorously evaluated as a legitimate alternative. The lack of an abolition option is a glaring omission that points to the coal industry's influence in the preparation of the EIS.

Two of the "action" alternatives would build on existing pieces of the permitting framework. The "action" alternative that would eliminate the so-called Nationwide-21 permit and subject all permits to a more thorough individual review IS NOT an acceptable concession to the environmental community. Coal River Mountain Watch believes that this "action" alternative should be imposed as a MINIMUM interim reform while other proposals are considered.

An "action" alternative that would permit all mines under Nationwide-21 is blatant pandering to the coal industry. Coal River Mountain Watch believes that the Nationwide-21 permit is, in fact, illegal under existing mining laws. Our organization is currently participating in litigation to establish this fact. Regardless of its legality, this permit has been recklessly applied to surface mines throughout Appalachia, allowing them to operate without proper oversight or safeguards to the public.

The reason for including this alternative, we believe, is that it creates an illusion of what the coal industry likes to call "balance." It is worth repeating that we DO NOT regard the elimination of Nationwide-21 as a concession. The illusion of balance played out in the EIS public hearing held in Charleston. The coal industry played its part by arguing in favor of the Nationwide-21 permit.

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Concerned citizens largely refused to play their part. Instead of arguing in favor of the option to eliminate Nationwide-21, most argued that the EIS is a flawed document. These comments ranged from the poetic (the EIS is a "shame and a sham") to the blunt ("this is bullshit").

The EIS has a built in escape hatch for its creators. The third "action" alternative is a vague statement calling for more cooperation between permitting agencies to expedite the review process. This option is truly obscene. This option contradicts the volumes of scientific evidence included in the EIS, all of which testifies to the adverse effects of mountaintop removal and valley fills on the environment. The vague generalities of the option and its emphasis of expediting permit review are blatant gifts to the coal industry. The entire issue of mountaintop removal coal mining has arisen because the industry has exploited similar vagaries in the Surface Mine Control and Reclamation Act.

If adopted, this "action" alternative would have no substantial difference from the "no action" alternative. By choosing this (no) action alternative, the EIS authorities can complete their balance charade. They can choose to "act" by adopting a proposal that will allow them to take virtually no action. There would be no substantial changes to current mountaintop removal practices. In fact, the proposed "action" would directly contradict the purpose of the EIS and the extensive scientific data included in it.

We are dismayed by the EIS. It does not fulfill its court-ordered mandate. While the science in the statement testifies to the adverse impacts of mountaintop removal, the summary and proposed alternatives does not honestly consider that evidence or the impacts of mountaintop removal on the citizens of central Appalachia.

Coal River Mountain Watch believes that mountaintop removal coal mining is human, economic and ecological disaster that should be completely abolished. The Nationwide-21 permit should be eliminated as an initial step towards reforming surface mining in accordance with already existing laws. But this

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step in no way adequately addresses the needs of coalfield residents in central Appalachia.

Coal River Mountain Watch recommends that the Draft EIS be rejected. Rather than make cosmetic changes to existing permitting policies and procedures, we recommend that the EIS provide leadership in developing new standards for coal mining. For the EIS to be regarded as a legitimate document, it must include a thoroughly evaluated plan for abolishing mountaintop removal.

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On behalf of our members, staff and board of directors,

  
Janice Nease, Executive Director

  
Bill Price, President

## CATHOLIC COMMITTEE OF APPALACHIA

P.O. Box 62, Wittenburg, KY 41274

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July 22, 2003

### Hearing on Mountain Top Removal:

At it's 1998 Annual Meeting, the members of the Catholic Committee of Appalachia passed a resolution calling for the end of mountain top removal and valley fill strip mining. Attached is a copy of that resolution.

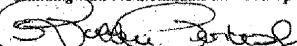
The Catholic Committee of Appalachia stands committed to this resolution today! The results of the devastating flooding in West Virginia and Eastern Kentucky, although identified as "Acts of God," are directly related to the current mountain top removal and valley fill strip-mining practices. Many poor communities have been destroyed with little or no resources to rebuild. Many of these communities, where flooding to this degree has not been seen in the last 100 years, have experienced several floods within the last few months. Lives have been lost, communities demolished, hope destroyed! It's time we hold those responsible accountable.

For more than 30 years, the Catholic Committee of Appalachia -- whose memberships include Bishops, clergy, religious sisters and brothers, and the laity -- has been a voice for the powerless and for the sacredness of the earth. Our membership expands the entire Appalachian region and even beyond. Many of our members work in these areas devastated by the floods. We stand as a Church calling for those with legislative power to stop a practice that detrimentally impacts the poor and the land at the benefit of those with wealth.

On behalf of the members of the Catholic Committee of Appalachia, I call for the end of mountain top removal and valley fill strip mining. We will continue to mobilize, in collaboration with other committed groups, to end this violence to our land and people!

It is with gratitude that I submit this letter and attached Resolution. We appreciate the opportunity to share with you our experiences, as people of faith, of devastation and frustration. On behalf of the Catholic Committee of Appalachia, **thank you!**

*Standing with the mountains and God's people,*

  
Sister Robbie Pentecost, OSF  
Executive Director

## Resolution on Mountain Top Removal/Valley Fill Strip Mining

The following resolution was passed unanimously by Catholic Committee of Appalachia members present at the 1998 Annual Meeting: "Voices of Sustainability."

Whereas, Psalms 24:1 firmly reminds us that "The Earth is the Lord's, and the fullness thereof; and the world, and they that dwell therein," and

Whereas, "God's covenant is with all living creatures" (Genesis 9:9) and

Whereas, "Christ came to redeem all Creation (Colossians 1:15-20 and Romans 8:21), and

Whereas, we are called to be stewards in right relationship with creation (Genesis 1:26-28), and

Whereas, the Commission on Religion in Appalachia (CORA) and its member denominations have affirmed "an economics of stewardship which recognizes that meeting human need and caring for the earth and its resources are the basic essentials in any system which is faithful to the Creator", (Economic Transformation, the Appalachian Challenge, CORA, short version, page 5) and

Whereas, mountain top removal coal mining is extremely profitable to the coal companies who practice it, and

Whereas, a large part of its profitability is that fewer miners are required than in the usual traditional methods of coal mining, and

Whereas, entire tops of mountains have been removed in the Appalachian areas of the states of West Virginia, Virginia, Kentucky, Pennsylvania, Tennessee, and Ohio, and

Whereas, this removal of mountaintops has resulted in severe and unlawful damage to the homes of persons living in the nearby communities, along with damage to wells, the bombing of their homes with flyrock, and massive amounts of dust, and

Whereas, the millions and millions of tons of earth and rock removed from the tops of mountains are dumped into the valleys next to these mountains totally destroying the springs and the head waters of streams in these valleys, along with all animal and plant life in them, and

Whereas, mountain top removal mining, by destroying home places, is also destroying ancestral ground, sacred ground where generations after generations have lived, gone to church, married, made and birthed babies, taken family meals, slept in peace, died and been buried, and

Whereas, Environmental Protection Agency staff has stated that the long-term effects of mountain top removal mining is unstudied and unknown and that increasing the acreage of these valley fills prior to studying the long-term effects on the environment is ill-advised, and

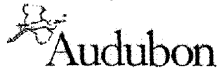
Whereas, the Appalachian region has a long history of outside corporations profiting from the extraction of the region's resources in such a way that the prosperity is not equitably shared with the residents of the region, and that the environment has been damaged by such outside resource extraction, and that this damage harms the region's current economy and future economic potential, and

Whereas, grassroots organizations and regional coalitions working in partnership with the Coalition on Religion in Appalachia (CORA) and its denominational partners are responding to the increasing use of mountain top/valley fill by coal mining companies and these organizations are taking action to try to protect the ecological integrity of the region and to publicize the need for economic development which benefits the people of Appalachia, and

Whereas, the sanctity and sacredness of all life and the natural environment created by God should not be destroyed in the name of corporate profit,

Therefore, be it resolved, that the Catholic Committee of Appalachia (CCA) and its members implore the Governors, legislatures, and other appropriate agencies in the Appalachian coal producing states to require that mountain top removal/valley fill mining be stopped and it not be resumed until scientific study of its long-term effects on human life and the natural environment has been accomplished; and

Implementation: CCA members and the Board of Directors agree that, to the extent they are able, they will contact their respective Governors, legislators, and representatives of mining enforcement and environmental protection by phone, fax, mail or e-mail. CCA members and its Board of Directors will inform these parties of CCA's position on mountain top removal/valley fill strip mining as outlined by the above. The CCA office will be responsible for keeping track of how the resolution is being implemented. Please let the CCA office know who you are contacting. Relay this information to: CCA, PO Box 62, Wittenburg, KY 41274 phone (606) 297-8792. e-mail: ccappal@foothills.net.



REC'D JAN 09 2004

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www.audubon.org

January 6, 2004

John Forren  
U.S. EPA (3E30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

National Audubon Society submits the following comments on the Draft Programmatic Environmental Impact Statement (DEIS) on Mountain Top Mining/Valley Fill (MTM/VF) in the Appalachian region of the eastern United States. Audubon is concerned about the severe impacts of MTM/VF on a variety of terrestrial and aquatic organisms. However, for the purposes of this comment letter our main concern is on impacts to migratory birds. We find that the DEIS fails to meet the requirements of the National Environmental Policy Act (NEPA) and, therefore, is inadequate. The DEIS is inadequate in that it fails to adequately assess the impacts, including cumulative impacts of MTM/VF on migratory birds, fails to consider a reasonable range of alternatives, and fails to adequately assess measures to mitigate unavoidable impacts to birds.

Of particular concern to Audubon is the impact of MTM/VF on Cerulean Warblers. Audubon is one of several groups that have petitioned the U. S. Fish & Wildlife Service (FWS) to list the species as threatened under the Endangered Species Act (ESA). As the FWS has acknowledged, the Cerulean has experienced a precipitous population decline over the past 36 years. This decline is due to loss of habitat both in the United States and South America. In our January 21, 2003 comments submitted to the FWS regarding ESA listing for the Cerulean, we emphasized that one of the major sources of current and future habitat loss is surface coal mining operations in West Virginia and Tennessee, the core of the species' population abundance and breeding area. These mining operations destroy the forest habitat inhabited by Ceruleans. Mining in recent years has led to an increase in the decline of this species in the Appalachian region, and continued mining operations, as proposed in the draft EIS, will only increase the need for listing the species under the ESA. The draft EIS fails to adequately address this important issue.

The goal of NEPA is to ensure informed decision-making regarding proposed actions that may adversely affect the environment. To achieve this goal, NEPA requires agencies to take a "hard look" at the environmental consequences of the proposed action before it is taken. This means that an EIS must fully disclose environmental impacts; consider a reasonable range of alternatives, including alternatives that minimize environmental impacts; fully assess cumulative impacts of the proposed action; and assess measures to mitigate unavoidable environmental effects. The draft EIS fails to meet these requirements.

First, the Draft EIS fails to fully disclose the effects of MTM/VF on migratory birds, including Cerulean Warblers. Cerulean Warblers have suffered a precipitous 80% decline in population over the past 36 years. Because of this dramatic drop in population, Audubon and several other conservation organizations have petitioned the Fish and Wildlife Service (FWS) to list the species as threatened under the ESA. In response, the FWS determined that sufficient information was provided to undertake a status review as required under the ESA. That review is still ongoing. The core of the Cerulean's breeding range is largely within the EIS study area. Since Ceruleans require large tracts of intact forest for successful breeding, mountaintop mining within the study area will have a dramatic negative impact on Ceruleans. Research completed in 2002 by Drs. Weakland and Wood at West Virginia University provides the best information to date on the effects to Cerulean Warblers from the forest loss and fragmentation that occurs with mountain top mining. Inexplicably, this research was not included in the draft EIS, even though it was available at the time the EIS was prepared and the FWS strongly urged that it be included. Because the draft EIS fails to include the Weakland and Wood research – the best scientific information available – the EIS fails to fully disclose the effects of MTM/VF on Cerulean Warblers. Similarly, the draft EIS also fails to fully disclose the cumulative effects of past and projected future mining on Ceruleans. In particular, the EIS fails to acknowledge that the Cerulean is listed on the U.S. Fish and Wildlife Service's (FWS) 2002 Birds of Conservation Concern. That list includes all species for which special management actions and habitat conservation actions should be undertaken by federal agencies in order to avoid continued population decline and potential future listing under the ESA.

Second, the EIS fails to consider a "reasonable range of alternatives" as required by NEPA. The alternatives considered in the draft EIS are merely different variations on regulatory streamlining. The draft EIS provides no alternative that includes protecting some important habitat areas from mining or changing the methods of mining or mitigation in a way to minimize, with certainty, the environmental consequences of MTM/VF. This is not only a violation of NEPA, but it appears to also be contrary to the settlement agreement that was the impetus for this EIS. The failure to include alternatives that protect some migratory bird habitat from destruction is also a violation of Executive Order 13186 which requires federal agencies to cooperate with the FWS in order to promote the conservation of migratory birds. This draft EIS should be withdrawn and a new EIS prepared that includes additional alternatives including a environmentally preferable alternative that analyzes changes to current mining practices that ensure habitat loss and other adverse effects are minimized.

Finally, the draft EIS fails to adequately assess mitigation measures for the loss of hardwood forest habitat. The draft EIS suggests that mined areas could be reforested. However, the EIS also concedes that new methods of forest reclamation are untested and that given the conditions needed for reforestation, it is not likely that reclamation would be successful. The draft EIS also suggests that some areas might be replaced with grassland habitat for "rare" eastern grassland species. It is inappropriate to suggest converting one habitat type to another is adequate mitigation. Thus, these suggestions will not, in fact, mitigate the environmental devastation caused by MTM/VF. Migratory birds, and Cerulean Warblers in particular, will suffer population declines because of habitat loss due to mining activities. Conversion to grassland will be of no benefit to Ceruleans and, even if reforestation were successful (which is doubtful) it will be hundreds if not thousands of years before suitable habitat for Ceruleans is reestablished. Mitigation is really not possible, a point the draft EIS fails to acknowledge. The only option that comes close to mitigation is to identify core areas for Ceruleans and other migratory birds and ban mining in those areas.

In sum, the draft EIS fails to adequately meet the requirements of NEPA in its assessment of impacts to migratory birds within the study area, particularly Cerulean Warblers, for which considerable information exists. In addition, the EIS fails to consider a reasonable range of alternatives and fails to adequately assess

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mitigation measures. Therefore we ask the agencies to withdraw this draft EIS and prepare a new draft that remedies the flaws in this EIS.

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Thank you for considering these comments.

Sincerely,



Bob Perciasepe  
Chief Operating Officer and Acting  
Senior Vice President for Public Policy  
National Audubon Society



## Kentucky Waterways Alliance

854 Horton Lane, Munfordville, KY 42765-8135  
270-524-1774 Director@KWAlliance.org

December 31, 2003

Mr. John Forren  
U.S. EPA (3EA30)  
1650 Arch Street  
Philadelphia, PA 19103

RE: Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement

Dear Mr. Forren,

I submit these comments on behalf of the Kentucky Waterways Alliance regarding the Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement. These comments apply to all the agencies who participated in the EIS and should be considered in any decisions that the US Army Corps of Engineers, US EPA, US Fish & Wildlife Service, US Department of Interior, Department of Surface Mining and West Virginia DEP make based on the EIS.

The Kentucky Waterways Alliance, Inc. (KWA) is a statewide nonprofit organization dedicated to protecting and restoring Kentucky's waterways and their watersheds by building effective alliances for their stewardship. We have many members who live in eastern Kentucky and care about the streams in the Appalachia region. Our members fish and eat fish from these streams, swim, canoe and otherwise enjoy the beauty of these waters and rely upon them for drinking water and other beneficial uses.

### General comments and observations

Over 30 studies were funded as a part of this court-settlement investigation into the impacts of mountaintop mining and associated excess spoil disposal valley fills. The studies in the EIS demonstrated that mountaintop mining and valley fills have already caused extensive ecological harm to Appalachia, destroying almost seven percent of forests in the region and burying or damaging nearly 1,200 miles of headwater streams. Ironically, the studies also indicated that placing tighter restrictions on the use of valley fills would have a negligible impact on the economy. Yet with the proposing of the three alternatives you have chosen to completely ignore the scientific and economic studies in your own reports and current Clean Water and Surface Mining Laws to present a so called "status quo option" (that eliminates the current stream buffer zone rule), and two other options that would make these destructive and unnecessary practices easier.

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All three recommendations contained in the EIS report are completely irresponsible and illegal under the Clean Water Act. They will not protect our stream or our forest ecosystems. Equally alarming, they will not protect our communities and families. They will not solve any of the problems caused by mountaintop removal mining and valley fills. Instead, the governmental agencies charged with enforcing the laws have used the EIS process to develop a series of rule changes that will make it easier for coal companies to get permits for mountaintop removal mining and valley fills.

The EIS disregards all scientific evidence and current Clean Water Act (CWA) and Surface Mining (SMCRA) laws in an attempt to justify and even encourage the practices of mountaintop mining and valley fills. The report rejects even considering specific restrictions on the use of valley fills based on size, cumulative impacts, types of streams, or the high value of the aquatic resources in the region.

KWA does not support any of the three alternatives in the report, but believes that the status quo (Alternative #1) is the least harmful to the natural resources and people in Appalachia. However, even Alternative #1 contains significant changes to the Stream Buffer Zone rule that we believe must be eliminated and are discussed in detail below. In addition, we believe it is very misleading to call this option the "status quo" since it proposes significant weakening of stream protections by eliminating the Stream Buffer Zone rule.

#### Specific comments on all three alternatives: Stream Zone Buffer Rule and Excess Spoil

All three of the alternatives presented would do away with a 25-year-old rule that says mining impacts cannot come within 100 feet of streams (stream buffer zone rule). In March of 2003, the Office of Surface Mining (OSM) released an Outreach Document that also proposed the elimination of the stream buffer zone rule under the guise of consistency with the excess spoil rule. KWA submitted comments on this document to OSM but apparently those comments have been disregarded as the elimination of this rule is proposed again in the EIS for all three alternatives. I will reiterate portions of our comments on the Outreach Document herein, for the record.

There is no conflict between the Stream Buffer Zone (SBZ) and the excess spoil rule and KWA urges OSM to refrain from any new rulemaking and simply enforce the current rules. The "apparent conflict" is between the law and the permitting practices approved by OSM. Aligning the SBZ rule with OSM's historical application of the regulations amounts to overriding congressional intent and SMCRA and would be illegal under the Clean Water Act (CWA).

KWA believes it is clear that SMCRA must be consistent with the CWA. Therefore, SMCRA cannot not supersede, amend, modify, or repeal any rule or regulation promulgated thereunder. 30 U.S.C. 1292. Both the SBZ rule and excess spoil disposal rule must be consistent the CWA.

The primary goal of the CWA is "to restore and maintain the chemical, physical and biological integrity of the nation's waters". OSM should retain the current rules, not only because they are more protective of the environment, but also because these rules serve to implement SMCRA in a manner reasonably consistent with the Clean Water Act. The proposed rule changes would weaken stream protections that have been in effect for two decades and would be inconsistent with the CWA.

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If there is controversy regarding the enforcement and interpretation of the SBZ and excess soil rule it is because mountain top removal activities and associated valley fills continue to increase in size as the cheapest, easiest way for coal companies to dispose of excess soil that result from mountain top removal is to fill in valleys and the headwater streams in those valleys. OSM and state agencies have failed to enforce the existing rules and this has lead to lawsuits and a (perceived) controversy with the CWA.

Aligning the SBZ rule with OSM's historical application of the regulations amounts to your agency overriding congressional intent and SMCRA and legitimizing the continued destruction of the "waters of the US". OSM should simply require the states to enforce the current rule. We urge OSM to maintain the current SBZ and excess spoil disposal rule and simply enforce existing regulations.

SMCRA states its purpose is "to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). Environmental standards in SMCRA prescribe that mining operations must "minimize the disturbances to the prevailing hydrologic balance at the mine-site," and "minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values." 30 U.S.C. § 1265(b)(10), (b)(24).

The buffer zone rule applies only to "intermittent" and "perennial" streams, and not to "ephemeral" streams. As those terms are defined by SMCRA regulation, ephemeral streams are streams, or portions of streams, that flow "only in direct response to precipitation in the immediate watershed." An "intermittent" stream is a stream, or stream portion, that "obtains its flow from the surface runoff and groundwater discharge." "Perennial" streams are streams, or stream portions, that flow continuously during the calendar year. 30 C.F.R. 701.5.

Protection of intermittent and perennial streams is required by SMCRA and by the CWA. Restricting negative stream impacts to ephemeral streams is economically achievable, helps minimize damage to headwaters and downstream navigable waters and is in the public interest. OSM should refrain from rulemaking and enforce the SBZ rule as is legal under both the CWA and SMCRA. This would require the enforcement of the SBZ rule for intermittent and perennial streams and restricting negative impacts to ephemeral streams.

These comments, submitted in response to OSM's Outreach Document are equally applicable to the EIS. The Stream Buffer Zone rule cannot and should not be illegally disregarded and the EIS should be changed to make it clear that the agencies will continue to abide by the federal CWA and will enforce this rule -- unless and until such time as Congress enacts legislation to change the CWA and eliminates this vital portion of the law intended to protect our streams from the harmful effects of mining.

#### Scientific Findings in the EIS

The studies included in the report document the extensive environmental damage caused by mountaintop removal/valley fills in Appalachia between 1985 and 2001. Some of the environmental damage documented in the report include:

- 724 miles of streams across the Central Appalachian region were buried by valley fills between 1985 and 2001;

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- twice that number of stream miles are currently approved for destruction in existing permits;
- an additional 1,200 miles of streams have already been impacted by valley fills;
- selenium was found only in those coalfield streams below valley fills (selenium is a metalloid that, according to the EPA, "can be highly toxic to aquatic life even at relatively low concentrations");
- amphibians and other aquatic life forms including fish in impacted areas and downstream of valley fills are being harmed or killed, changing the entire native species balance in Appalachia;
- interior forest songbirds, native to the area decline significantly in mined and even reclaimed mining areas;
- Streams in impacted watersheds have higher base flows and are subjected to higher runoff rates during larger rainfall events. Both of these facts contribute to the increased frequency and severity of flooding in Appalachia and the loss of life and property in our communities in recent years due to flash flooding.
- without additional restrictions, a total of 2,200 square miles of Appalachian forests (6.8 percent) would be eliminated by 2012 by large-scale mining operations;
- without additional environmental restrictions, mountaintop removal mining will destroy an additional 600 square miles of land and 1000 miles of streams in the next decade.

#### Clear and Common Regulatory Definitions

Under the guise of clear and common regulatory definitions the report again proposes a rule change first proposed a year and a half ago which changed the definition of "fill" in order to allow the Corps of Engineers to give permits for valley fills under the Clean Water Act. (Proposed Rule: Federal Register Doc. 99-940 Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material")

We oppose any effort to grant the Army Corps of Engineers the authority to issue permits for this destructive practice. We oppose any attempt to allow waterbodies to be filled by a wide array of wastes, including hard rock mining waste, industrial waste.

While unifying the EPA's and Army Corps' definitions of "fill material" makes sense, and the elimination of the primary purpose test will resolve some ambiguity in the current regulatory scheme, any common regulatory definition must adhere to the Clean Water Act and not permit waters to be turned into waste dumps – the very thing the Act was created to prevent, 30 years ago.

#### Science Based Methods for Definition and Delineation of Stream Characteristics and Impacts

The EIS calls for "science based methods for definition and delineation of stream characteristics and impacts." This appears to support another recent rulemaking to change the definition of the "Waters of the US" in order to "define" certain types of streams out of existence for the purposes of regulation.

EPA received over 137,000 comments on the recent rulemaking attempt to redefine the "Waters of the US" the vast majority of the comments from citizens, environmental and conservation groups as well as state agencies were against the redefinition that in Kentucky alone would

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reduce the number of stream miles regulated and protected under the CWA from over 89,000 to approximately 40,000.

Scientists and regulators know what a stream is. We do not need and will not support a redefinition that will remove Clean Water Act protections of thirty years from 40% or more of this nation's and Kentucky's waterways.

The recent announcement that the EPA and Corps will not move forward with the re-definition of the "waters of the US" is supported by KWA and most of the other 137,000 comments submitted during the public comment period.

In the report of the invitational symposium held to gather expert testimony on the value of headwater streams included in the study, leading fish experts who have many years of studying the headwater streams in Appalachia declared that there was no stream too small to be of importance to native fish and other aquatic species. And the report concludes with the statement that "THE SENTIMENT OF PROBABLY MOST OF THE PEOPLE IN THIS ROOM IS THAT THIS VALLEY FILLING IS A BAD IDEA, AND THAT THE WEIGHT OF THE SCIENTIFIC EVIDENCE – THE IMPACT YOU COULD DOCUMENT, ALTHOUGH IT MIGHT BE A LOT OF PROBLEM TO DO IT – WOULD MAKE A STRONG CASE AGAINST DOING IT AT ALL."

The report states that: "The geographic focus of this study involves approximately 12 million acres, encompassing most of eastern Kentucky, southern West Virginia, western Virginia, and scattered areas of eastern Tennessee. The study area contains about 59,000 miles of streams. Some of the streams flow all year, some flow part of the year, and some flow only briefly after a rainstorm or snow melt. Most of the streams discussed in this EIS are considered headwater streams. Headwater streams are generally important ecologically because they contain not only diverse invertebrate assemblages, but some unique aquatic species. Headwater streams also provide organic energy that is critical to fish and other aquatic species throughout an entire river. Ecologically, the study area is valuable because of its rich plant life and because it is a suitable habitat for diverse populations of migratory songbirds, mammals, and amphibians." There is no doubt in the professional opinion of any of these experts that even the smallest streams are indeed streams and are indeed important to the ecology and bio-diversity of the region.

#### Irreversible and Irretrievable Commitment of Resources (Chapter IV: Environmental Consequences)

This chapter makes it clear that the loss of over 700 miles of streams in this region between 1985 and 2001 and the currently permitted loss of twice that number of stream miles is permanent. The irreversible and irretrievable loss of these entire aquatic ecosystems must be considered. Similarly the loss of valuable topsoil the removal of trees and destruction of entire forest ecosystems must be considered in a mountaintop removal operation.

#### Water Quality Impacts of Mountain Mining/Valley Fills (MTM/VF)

The EPA Water Chemistry Report found elevated concentrations of sulfate, total and dissolved solids, conductivity, selenium and several other analytes in stream water at sampling stations below mined/filled sites [Appendix D; USEPA, 2002b]. Other studies found elevated concentrations of sulfates, total and dissolved solids, conductivity, as well as other analytes in surface water downstream from MTM/VF sites.

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Studies conducted as a part of this EIS show that aquatic communities downstream from MTM/VF differ from unmined headwater streams in several ways. In most cases, there were differences in biological assemblages. Generally, macroinvertebrate communities below mined areas were more pollution tolerant than those below unmined watersheds.

The two preceding paragraphs were taken verbatim from Chapter IV of the report. The studies show water quality is degraded from MTM/VF operations and under the Clean Water Act each permit must undergo an antidegradation review. Not only has this never been required in Kentucky, but general permits that cover most coal discharges do not even require mining operations to test for selenium and the other analytes commonly found at these sites according to EPA's own studies.

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#### Summary and Conclusion

KWA rejects all three alternatives as unprotective of the environment. Furthermore even the "status quo" (Alternative #1) option presented is misleading in that it contains a significant change in Clean Water Act protections for streams. If the regulatory agencies we trust to enforce existing environmental laws wish to change those laws they must do so in the clear light of day and with the full backing and understanding of the American public and Congress.

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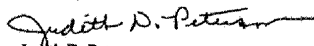
We strongly urge US EPA, US Army Corps of Engineers, US Fish & Wildlife Service and the West Virginia DEP to go back and read the report and the 30 studies conducted to gather data and issue a new DEIS that is consistent with the vast majority of scientific evidence presented. Such a DEIS will we believe support the enforcement of existing laws and be protective of the environment and the citizens in Appalachia.

If the EPA is unwilling or unable to issue a new DEIS that fairly reflects the vast majority of the scientific evidence presented in these reports, then we urge the removal of the SBZ provisions and the return to the status quo (Alternative #1 —modified to remove the new provisions to the SBZ).

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I am as always willing to answer any questions you may have and discuss our concerns in more detail.

Sincerely,



Judith D. Petersen  
Executive Director

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----- Forwarded by David Rider/R3/USEPA/US on 01/08/2004 01:40 PM -----

Bill Price

<bill.price@sierraclub.org> To: John Forren/R3/USEPA/US@EPA  
cc: R3 Mountaintop@EPA

Subject: Comments on EIS from Sierra Club-

Appalachian Region

01/06/2004 03:03  
PM

January 5th, 2004

Mr. John Forren  
Environmental Protection Agency  
1650 Arch St.  
Philadelphia, PA 19103

Please consider the following comments on behalf of the Sierra Club regarding the Draft Environment Impact Study (DEIS) released by the Environmental Protection Agency (EPA) on May 29th, 2003.

We are opposed to any changes that would weaken the laws and regulations that protect the heritage, environment, and communities of Central Appalachia from the effects of mountaintop mining and valley fills.

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We believe that the data presented in the DEIS confirm that the environmental harm caused by mountaintop removal and valley fill operations is significant and likely to be irreversible. For example, the data show:

\* Approximately 1200 miles of headwater streams "were directly impacted"

by mountaintop removal and valley fills between 1992 and 2002. From 1985 to 2001, valley fills covered an estimated 724 stream miles.

\* No scientific basis could be established for arriving at an environmentally "acceptable" amount of stream loss and it is "difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites."

\* Stream chemistry monitoring efforts show significant increases in conductivity, hardness, sulfate, and selenium concentrations downstream of mountaintop removal operations. Selenium is highly toxic to aquatic life at relatively low concentrations.

\* There is "no evidence that native hardwood forests . . . will eventually recolonize large mountaintop mine sites using current reclamation methods."

\* Large-scale surface coal mining "will result in the conversion of large portions of one of the most heavily forested areas of the country, also considered one of the most biologically diverse, to grassland habitat."

The Sierra Club is opposed to each of the alternatives evaluated in the DEIS.

\* Alternative # 1 - STATUS QUO  
Under this alternative, the Army Corps of Engineers is responsible for reviewing and granting or denying permits for new valley fills in streams. Under this option, the report recommends that the Office of Surface Mining do away with the stream buffer zone rule that prohibits mining activity

within 100 feet of streams. We are adamantly opposed to the elimination of the stream buffer rule.

\* Alternative # 2 - THE ADMINISTRATION'S PREFERRED OPTION  
This alternative would create one permit application that coal companies would submit to the Army Corps of Engineers and the Office of Surface Mining (OSM). The two agencies would have a joint role in determining the size and location of valley fills. This alternative would clearly increase the amount of damage caused by this irresponsible mining practice. It would "clarify" the stream buffer zone rule by saying that it does not apply to valley fills. We are opposed to an interpretation of the stream buffer rule that would remove valley fills from the rule.

\* Alternative # 3 - GIVES THE LEAD ROLE TO THE OSM  
This alternative would give the lead role in permitting valley fills to the Office of Surface Mining. The Army Corps of Engineers would step in only if they determined, after the surface mining agencies had granted a permit, that a more detailed assessment of the proposed valley fill was needed. It also would do away with the buffer zone rule. Again, we are adamantly opposed to the elimination of the stream buffer rule.

It is significant that the DEIS does not even consider an alternative involving new limits on valley fills. A preliminary draft, issued in January 2001, analyzed alternatives that would significantly limit the size of mountaintop removal valley fills. The Preliminary Draft evaluated four options, including "no action" (essentially relying on existing law pre-1998 to regulate mountaintop removal), a 0 to 75 acre limit (which would allow

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fills primarily in ephemeral streams) and a 75 to 250 acre limit (which would allow fills in intermittent streams). The fourth alternative examined a scenario with no acre cap but with other regulatory changes to reduce the effects of valley fills on the environment and communities. Without additional restrictions, a total of 2,200 square miles of Appalachian forests (6.8 percent) will be eliminated by 2012 by large-scale mining operations. Without additional environmental restrictions, mountaintop removal mining will destroy an additional 600 square miles of land and 1000 miles of streams in the next decade. The citizens of the region deserve a full evaluation of ways to reduce the unacceptable impacts of mountaintop removal mining.

Coalfield citizens and environmental supporters originally requested the EIS report in order to identify ways to better protect our land, water and people. Indeed, the studies contained within this 5,000-page document show that the damage caused by mountaintop removal mining is more widespread and severe than previously known. However the DEIS ignores the evidence and instead focuses on issues of "government efficiency" and the need to "provide a basis for more predictable business and mine planning decisions." It ignores the real problems facing the region. It ignores the science and evidence about what mountaintop removal mining is doing to the Appalachian Region. It ignores the public's desire for clean water, healthy environment and safe communities. It is a blueprint for the continued devastation of our homes and environment. The Sierra Club would only be able to support an alternative that minimizes the severe impacts of mountain top removal mining. For these reasons, we oppose all three recommendations of the Draft Environmental Impact Study. We urge the EPA to reevaluate a full range

of options that will minimize the enormous environmental and economic damage caused by mountaintop removal mining and valley fills and issue a Supplemental EIS.

Bill Price  
Sierra Club  
Appalachian Region

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A Lasting World (ALW)  
P.O. Box 1824  
Crystal Lake, Illinois 60039-1824  
January 2, 2004

REC'D JAN 09 2004

Mr. John Forren  
U.S. EPA (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

We are the Cofounders of a grassroots environmental organization with over 160 members worldwide. Since our inception two years ago, much of our hands-on environmental work has been done in the forests and in the mountains of the state of Kentucky. We have also sponsored several Earth Day events/celebrations in that state. We are grateful to the Kentuckians for the Commonwealth (KFTC) for their consistent support, for their knowledge and expertise, and for their shared vision to help keep Kentucky and the Earth healthy and beautiful for all of us.

We have spent a considerable amount of time studying and reviewing the Environmental Impact Statement (EIS) on mountaintop removal and valley fills. We have discussed the issue of mountaintop removal with noted environmentalists, with mountain residents whose homeland is being destroyed or threatened, and with members of the KFTC steering committee. We have also listened to shallow arguments from coal company representatives who would like to have us believe that what we have seen with our own eyes is not really the truth.

It is time for us to make known our position on mountaintop removal and valley fills.

Mr. Forren, we, the members of ALW, are strongly opposed to mountaintop removal mining and valley fills.

We are opposed to any changes that would weaken the laws and regulations that protect clean water. In particular, we oppose the proposal to change the stream buffer zone rule that prohibits mining activity within 100 feet of streams.

We do not support Alternatives 1, 2 and 3 within the EIS report. As we understand them, Alternative 1 would mean no change in the current permitting system, Alternative 2 would have one permit application go to the Army Corps of Engineers and the Office of Surface Mining, which would have a joint role in determining the size and location of valley fills, and Alternative 3 would give the lead role in permitting valley fills to the Office of Surface Mining. None of these options will protect our water or our communities.

The EIS report documents extensive environmental damage caused by mountaintop removal and valley fills between 1985 and 2001, and yet the current Bush Administration ignores these findings and continues to ignore the public's demand for clean water, for a healthy environment and for safe communities.

We submit our comments to you for consideration and review. We hope our letter will help make a difference in ending mountaintop removal mining and valley fills before the Appalachians and the people who live there no longer exist.

Respectfully submitted,

*Andi Putman, Linda Bartlett, Wen Marzec*  
Andi Putman, Linda Bartlett, Wen Marzec  
Cofounders  
A Lasting World (ALW)

cc: Kentuckians for the Commonwealth (KFTC)

----- Forwarded by David Rider/ R3/USEPA/US on 01/08/2004 01:40 PM -----

ALastingWorld@aol  
.com To: R3 Mountaintop@EPA  
cc:  
01/02/2004 10:23 PM Subject: Attention: John Forren

A Lasting World (ALW)  
P.O. Box 1824  
Crystal Lake, Illinois 60039-1824  
January 2, 2004

Mr. John Forren  
U.S. EPA (3ES30)  
1650 Arch Street  
Philadelphia, PA 19103

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Friday, January 02, 2004 America Online: ALastingWorld

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Respectfully submitted,

Andi Putman, Linda Bartlett, Wen Marcec  
Cofounders  
A Lasting World (ALW)

cc: Kentuckians for the Commonwealth (KFTC)



west  
virginia  
highlands  
conservancy

MAILING ADDRESS • P. O. Box 306 • Charleston, West Virginia 25321

Publishers of The Highlands Voice and the Monongahela National Forest Hiking Guide

REC'D AUG 8 4 2003

August 4, 2003

FROM: Cindy Rank  
HC 78, Box 227  
Rock Cave, WV 26234  
Phone & fax: (304) 924-5802

TO: John Forren  
US EPA, Region III  
FAX: (215) 814-2783

John Forren:

Please consider this a formal request for an extension of the comment period relating to the DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT on Mountaintop Removal Mining/Valley Fills in Appalachia.

I verbally made this request on behalf of my local community group FOLK (Friends of the Little Kanawha) at the public hearing in Charleston, WV on July 24, 2003.

Today I would like to request a 90 day extension on behalf of the Mining Committee of the West Virginia Highlands Conservancy (a committee that I chair). Digesting the entire EIS document has proven to be an even more daunting task than I had originally hoped it would be.

Thank you for whatever consideration you can afford this request. Please notify me by mail, telephone or fax at my home address and/or phone numbers listed above.

Respectfully,

*Cindy Rank*  
Cindy Rank

3-5

Working since 1967 for the conservation and wise management of West Virginia's natural resources



EIS PUBLIC HEARING STATEMENT

July 22, 2003  
Hazard, Kentucky

I would like to thank this Committee for the opportunity to submit written comments concerning the Draft Programmatic Environmental Impact Statement. ENTERPRISE MINING COMPANY, LLC represents over 1.5 million tons of coal mined in Eastern Kentucky. .

With regard to the proposed EIS, any changes to existing rules need to be considerate of potential ramifications that hinder the mining industry's ability to continue to provide the economical energy demanded by the American public. Enterprise has demonstrated itself as capable to mine coal responsibly while providing lands suitable for a diverse range of activities. Level lands suitable for facilities such as hospitals, schools, shopping centers as well as farm and timber production have been developed through mining in Kentucky. ENTERPRISE MINING COMPANY, LLC is concerned that any new rules or regulations that may develop from this EIS will drastically inhibit future development of level lands in Eastern Kentucky through mining.

For decades professional planners have declared the number one problem that hinders economical development in the Central Appalachians to be the lack of level developable land. The mining industry has helped in the past and can help in the future to create level usable land ready for human development within our region. It is our fear that any regulation that goes too far in curbing these currently accepted practices of the past 20 + years will be detrimental to the

region in both the short and long run. In Kentucky we have built miles of water lines into areas that everyone said, why build there? No one will ever build anything there! They were wrong. Homes and businesses have sprung up all along those miles of then lonely water lines, just as development will occur on these man made level areas created as a result of mining. Don't deprive us of future development by eliminating the incentive to develop these lands.

Coal Mining is already one of the most heavily regulated industries in America. The regulation of mining does not need to be made more cumbersome by multiple federal agency bureaucratic regulations. The more overlapping and the more attempts by federal agencies to entrench themselves in job security by seizing dominance over the Office of Surface Mining and the various state mine regulatory agencies responsibilities is a travesty upon the American citizens who demand energy at an economically reasonable price and the working people who meet this demand. It further dismisses all the empirical environmental progress made by our efforts to protect the environment and create usable land in the last 20 years. In short, a knee jerk regulatory reaction to the EIS could be one huge step backwards.

Thank you for allowing our comments to be submitted. ENTERPRISE MINING COMPANY, LLC and its miners are proud to be part of this process and to be providing economical energy to millions of Americans.

Respectively,

Donald L. Ratliff  
Vice President of External Affairs

Enterprise Mining Company, LLC  
117 Madison Avenue Suite 2  
Whitesburg, Kentucky 41858

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10-3-5

Via e-mail to: [mountaintop@360epa.gov](mailto:mountaintop@360epa.gov) (3 pages)

2616 Mountain Brook Pkwy.  
Birmingham, Alabama 35223  
January 5, 2004

Environmental Protection Agency, Region 3  
1650 Arch Street  
Philadelphia, Pennsylvania

Gentlemen:

We write to supplement the comments on the Draft EIS for Mountaintop Mining/Valley Fill submitted by some 20 conservation agencies under date of December 30, 2003 ("the main comment letter"). We strongly urge -- and submit that it would be in the national interest -- that the present "preferred alternative" be withdrawn and reissued for public comment and (i) that an alternative containing environmental constraints like those advocated in the main comment letter be adopted and (ii) that filling all but the smallest ditches and ones with no free-flowing streams be strictly prohibited. We urge that any other alternative would be arbitrary and capricious and in violation of law, a position that the Administration should strongly avoid. We urge particularly:

(1) Great Biodiversity of Mountaintop and Ridgeline Forests -- The great biodiversity of the forests of the Southern Appalachians and Cumberland Plateau has been stressed in the main comment letter. These include sensitive bird species documented by the scientists working for Partners-in-Flight, the consortium of government agencies like the Fish & Wildlife Service and U.S. Forest Service and nongovernmental organizations, as well as salamanders, frogs and other amphibians (which are important enough even "to make" a recent issue of U.S. postage stamps). The birds include neotropical migrants such as the Wood Thrush, Kentucky Warbler, Ovenbird, Acadian Flycatcher and others, many of which have lost 50% of their population over the last 30 years. Further, this area is the world center for salamanders, very sensitive species of which there are more species here than anywhere else in the world!

One of the neotropical migrants is the Cerulean Warble, one of the most beautiful little birds on the planet. The adverse impacts on it of this mountaintop mining is documented by the studies reported in the main comment letter. But, please just note that this mining will adversely impact 380,000 acres of its mountain/ridge habitat. Scientific estimates are that, over ten years, there will be a loss of over 135,000 birds, which could well be more than this species can absorb. Consequently, it is essential that environmental constraints be included in the alternative that is adopted.

(2) Great Biodiversity of Riverine Forests -- These are one of the most productive, yet declining, habitats on earth. This is true for birds, mammals, fish and amphibians as well as trees and other plantlife. In fact, these are part of what was known, when the country was settled, as the Great Eastern Deciduous Forest. It should be unthinkable to destroy the riverine part of them by just dumping mining overburden on them! We asked at a meeting if the mining companies could not truck out the overburden spoil somewhere else and were advised that they opined, "That would be too

expensive." If it is too expensive to avoid destroying riverine forests, then it should obviously be too expensive to carry out the project!

(3) Lack of Cost-Effectiveness -- Destroying riverine forests is not cost-effective for many reasons. Among them, assimilation of wastes, recharge of groundwater, protection of biodiversity and protection of all types of natural resources (see above). It would cost government entities (and private organizations) much more to restore these resources -- and over a substantial time -- than could be gained from destroying them. Consequently, if the mining overburden spoil cannot be taken elsewhere, the mining project should not be carried out.

Reference has been made above and in the main comment letter to the adverse impacts on sensitive species. The Cerulean Warbler, for example, is under consideration for listing under the Endangered Species Act. It takes government (as well as private entities) much expense and much time to attempt to recover a species once its numbers have declined so that it is threatened or endangered. Consequently, it is not cost-effective to conduct any activities that would place them in that condition.

Consideration should also be given to destruction of scenic vistas and lost natural recreational activities from mountaintop mining and destroyed water resources. These represent lost recreational resources and tourist revenues that are costs that should also be taken into consideration.

(4) Violation of Administrative Procedures Act ("APA") -- Federal agencies are constrained by the APA (5 USC 701 et seq.) not to adopt any actions that are (i) arbitrary, (ii) capricious, (iii) an abuse of discretion, or (iv) otherwise not in accordance with law, in this case, the National Environmental Policy Act ("NEPA"). The agency cannot, under law, merely disregard environmental factors. That would be a violation of NEPA and APA. Applied to this case, an action not giving adequate consideration to the factors referred to in (1) through (3) above and in the main comment letter, particularly since they have been documented by scientific studies or are facts of general knowledge, would be unlawful.

APA applies to all forms of government action, environmental as well as otherwise. Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 at 43, 77 L.Ed.2d 442 at 458 (U.S. Supreme Court, 1983) (holding rescission of regulation requiring passive restraints in automobiles was arbitrary and capricious); Audubon Society of Central Arkansas v. Dailey, 977 F.2d 428 (8th Cir. 1982) (arbitrary and capricious choosing of alternatives by Corps of Engineers); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 at 784 (9th Cir. 1980) (per Mr. Justice Kennedy, then writing for the Ninth Circuit, holding a highway EIS defective for not evaluating an improved two-lane road); and ILGWU v. Donovan, 722 F.2d 795 (D.C. Cir. 1983) (holding action of Secy. of Labor, in eliminating restrictions on counting homework in setting wage rates, was arbitrary and capricious).

In State Farm, the Supreme Court stated, "The agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. . . . and whether there was a clear error of judgment." In Donovan,



referring to the CEQ Regs. 40 CFR 1502, that it is arbitrary for an agency to limit its consideration of alternatives, the court held that artificially narrowing his alternative options was "antithetical to reasoned decisionmaking and cannot be upheld, citing *State Farm*." Then, in the *Arkansas* case, it was held that, while the agency must take a "hard look" at the facts, it must take action on what that "hard look" showed and not "ignore what it saw." It is instructive that in *Canyon Preservation*, the Court, through now Mr. Justice Kennedy writing for the Ninth Circuit, held in a highway case that a two-lane road must be evaluated. That would translate to a different type of mountaintop mining as applied here, i.e. one with environmental constraints.

It appears that here the lead agency is being directed to limit its consideration of alternatives and would not be taking an action based on the known and established facts, i.e. would be ignoring what the required "hard look" shows. That is a violation of APA as well as NEPA and it would appear should also be a violation on the part of the officials directing that violation. We do not believe that is an action the Administration would intend be taken, especially at times like these. And, further, in times like these with the present budgetary deficits, it would appear the government should avoid all actions that are not cost-effective. For that reason, these comments are being sent to the OMB.

For the above reasons, these comments are submitted in behalf of the Alabama Audubon Council, Alabama Environmental Council and Alabama Ornithological Society, which have an aggregate of over 10,000 members in Alabama and surrounding states. Each of those organizations is strongly concerned over protection of all of our natural resources, and, for the same reasons, these comments are concurred in by the undersigned as an interested citizen and taxpayer. Your consideration will be greatly appreciated.

Sincerely yours,

/s/ Robert R. Reid, Jr.

Robert R. Reid, Jr., for himself and  
the above three organizations

cc: Director, Office of Management and Budget  
Commenting organizations

4-2

John Forren  
U.S. EPA (3EA30)  
1650 Arch Street  
Philadelphia, PA 19103  
mountaintop.3@epa.gov

REC'D JAN 9 2004

January 5, 2004

**Subject: Draft Programmatic Environmental Impact Statement on Mountain Top Mining/Valley Fill (MTM/VF) in the Appalachian region of the eastern United States.**

Dear Mr. Forren,

We write on behalf of the undersigned groups, representing thousands of citizens across Tennessee and Kentucky who are concerned about the harmful impacts that mountaintop mining/valley fill has on aquatic and terrestrial wildlife habitat. We feel that the alternatives presented in the Draft Programmatic Environmental Impact Statement are inadequate to address these impacts and that pertinent information was not considered in the formulation of this document. It is our opinion that these inadequacies are sufficient to require a new draft EIS and that a moratorium on new mountaintop mining permits be imposed until a final EIS is adopted with an environmentally acceptable alternative.

**The DEIS Fails to address MTM/VF impacts on High Priority Forest Bird Species.** Figures from the draft EIS project that an additional 380,000 acres of forest will be lost from the study area in the next 10 years. This number is based on the numbers of acres of forest that were lost between 1992 and 2002 from permitted mountaintop mining activities. We feel that this will cause an unacceptable loss of habitat required by the entire suite of mature forest birds of high conservation concern. The Cerulean Warbler, Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Wood Thrush, Yellow-throated Vireo, Acadian Flycatcher are all at or nearly at their maximum breeding density within the study area (USGS 2003). They are all listed as priority species by Partners in Flight and all are also classified as Birds of Conservation Concern by the U. S. Fish and Wildlife Service (USFWS 2002) within the Appalachian Bird Conservation Region, which overlaps the area considered in the draft EIS. We consider this level of habitat loss, in one of the most heavily forested areas in the country to be unacceptable, and especially so for the Cerulean Warbler, the forest species of highest concern in this area. Figures presented in the draft Northeast Partners-in-Flight letter (NEPIF 2003, attached with permission) indicate that habitat for roughly 9% of the world's ceruleans was lost to permitted mining activities between 1992 and 2002 and another 9% is projected to be lost between 2003 and 2012. We find this level of habitat loss for Cerulean Warblers and other terrestrial bird species to be unacceptable and we are disappointed that the draft EIS does not address this extremely important and significant environmental impact.

The DEIS omitted available data showing large potential Cerulean Warbler losses from mining impacts.

The Cerulean Warbler is the bird species we are most concerned with because it has suffered drastic population declines over the last several decades and more than any bird species in the study area, their nesting habitat will be the impacted by mountaintop mining/ valley fill activities. Not only do Cerulean Warblers prefer to nest on ridgetops, on mesic slopes and in cove forests at the head of valley streams (Rosenberg et al. 2000) but the core of its breeding range coincides very closely with the EIS study area (USGS 2003, Rosenberg et al. 2000). This species has been petitioned for listing under the Endangered Species Act and is also on the USFWS' National List of Birds of Conservation Concern (USFWS 2002).

Recent research indicated that the average density of Cerulean Warblers territories in intact forest near mined areas in West Virginia was 0.46 pairs/hectare (ha) (Weakland and Wood 2002). If this density estimate is accurate for the entire study area, then habitat for over 100,000 Cerulean Warblers was lost in the last 10 years and that number is projected to be lost in the next 10. In addition, this estimate does not include population loss from the reduced breeding densities in forest fragmented by mining and in forest adjacent to mined sites that Drs. Weakland and Wood found. This further increases the impact on the breeding population. We feel that this represents an unacceptable loss to a species whose population is roughly half or less than it was in the 1960s. We also feel that the omission of Drs. Weakland and Wood's Cerulean Warbler research from this draft EIS, when we know that it was made available to those involved in its development, to be sufficient to trigger a revision of the document.

#### The DEIS fails to address Executive Order 13186

Executive Order 13186: Responsibilities of Federal Agencies to Protect Migratory Birds, January 10, 2001, is specifically applicable in Tennessee because the agency issuing mining permits is the Office of Surface Mining. This Executive Order instructs federal agencies to integrate bird conservation principles and practices into agency activities and to avoid or minimize adverse impacts on migratory bird resources when conducting agency actions. Federal agencies are to "identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts."

The bird species most directly impacted by mountaintop mining: Cerulean Warbler, Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Wood Thrush, Yellow-throated Vireo, Acadian Flycatcher, are all listed as Birds of Conservation Concern by the U. S. Fish and Wildlife Service (USFWS 2002) within the Appalachian Bird Conservation Region. These are specifically the species that this Executive Order

was issued to protect. The list of Birds of Conservation Concern was mandated by Congress under 1988 amendments to the Fish and Wildlife Conservation Act and denotes species that without additional conservation actions are likely to become candidates for listing under the Endangered Species Act. We consider the draft EIS to be incomplete without addressing Executive Order 13186 and the impacts of mountaintop mining activities in Tennessee, and possibly throughout the study area, on these bird species.

#### The DEIS fails to identify effective mitigation measures to reduce impacts on terrestrial communities.

While the draft EIS reports on studies that have shown that a post mining change of habitat can provide habitat for declining grassland species, we find it inappropriate to consider replacing forest habitat with grassland habitat. "Rare" eastern grassland species are rare because their habitat is historically rare in this region. Recovery and habitat restoration efforts for these species should be targeted towards ecosystems and landscapes where they occurred historically, not on eastern mountaintops that currently support high quality forest habitats.

The only mitigation offered in the draft EIS for the destruction of large areas of hardwood forest habitat by mining operations is a suggestion that the mine sites could be reforested after operations cease. While recent research indicates that some forest species may be reestablished on reclaimed mine sites (Holl et al. 2001), we agree with statements in the draft EIS that these investigations have only recently begun and "that it would be premature to attempt to evaluate the success of these efforts at this time". Furthermore, the draft EIS concedes that "as post-mined sites will likely lack the requirements of slope, aspect and soil moisture needed for cove-hardwood forest communities, it is unlikely that these particular communities can be re-established through reclamation". Surface mining completely removes the topsoil, seed source and root stock of the forest communities on the site and the re-contoured post mining fill material will be substantially different hydrologically than the original ridge or mountain top. Convincing evidence that a hardwood forest, essentially the same as the one removed during mining, can be reestablished in a reasonable amount of time, needs to be presented before this method can be offered as mitigation for the loss of hundreds of thousands of acres of biologically diverse hardwood forest habitat.

#### DEIS projections may underestimated forest loss

The draft EIS does not take into consideration the anticipated increase in future demand for Appalachian coal in the study area due to the planned construction of flue gas desulfurization units (scrubbers) at some of the existing coal-fired generating plants owned by the Tennessee Valley Authority (TVA 2002) and other electric utilities in the region. This increase in mining activity has already begun in Tennessee. The draft EIS projects that Tennessee will issue permits causing the loss of 9,154 acres of forest between 2003 and 2012 based on permits issued between 1992 and 2002. However, between December 2002 and October 2003, over 5,000 acres of surface mining permits have already been approved (Siddell 2003). This potential underestimate of future mining impacts is substantial and needs to be investigated and incorporated in the analysis of cumulative impacts in a revised draft EIS.

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**DEIS fails to provide adequate alternatives to avoid environmental impacts**

We feel that the three alternative presented in the draft EIS are inadequate to reduce the impacts of mountaintop mining. The U.S. Fish and Wildlife Service apparently supports this view. In an interagency memo (USFWS 9/20/02), the FWS warns that publication of the draft EIS as written, "will further damage the credibility of the agencies involved." It states that the proposed actions offer "only meager environmental benefits" and criticizes the draft EIS for not considering "at least one alternative to restrict, or otherwise constrain, most valley fills to ephemeral stream reaches....As we have stated repeatedly, it is the service's position that the three 'action' alternatives, as currently written, cannot be interpreted as ensuring any improved environmental protection ... let alone protection that can be quantified or even estimated in advance. . .The reader is left wondering what genuine actions, if any, the agencies are actually proposing." We find that the draft EIS offers alternatives that would only streamline the permitting process for approval of new mountaintop-removal permits and thereby fails to comply with both the letter and the intent of the NEPA EIS process.

**A moratorium should be placed on new mining permits until the DEIS is revised and reissued for public comment.**

We propose that a moratorium be placed on new mountaintop mining permits until a new draft EIS is written that will:

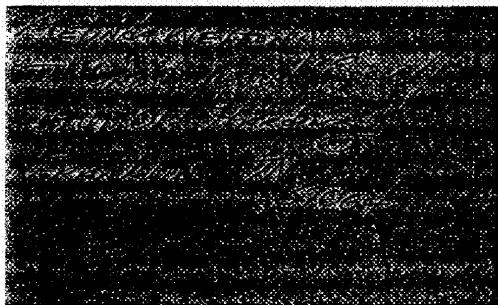
- 1) Include all relevant research and provide for the avoidance of key Cerulean Warbler habitat and provide significant environmental protection for other PIF priority species and FWS Birds of Conservation Concern,
- 2) Address the requirements of EO 13186,
- 3) Review and revise forest loss estimates and the analysis of cumulative impacts,
- 4) Provide environmentally sound alternatives that will reduce the impacts of mountaintop mining on aquatic and terrestrial communities.

This moratorium should continue until a final EIS is adopted with an environmentally acceptable alternative.

We appreciate the opportunity to comment on this Draft Environmental Impact Statement. This letter is being submitted via email. A paper version will follow.

Respectfully submitted,

Virginia Reynolds  
President  
Tennessee Ornithological Society  
4241 Waymar Drive  
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(901) 767-3547



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4-2

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**References:**

Executive Order 13186, January 10, 2001. Responsibilities of Federal Agencies to Protect Migratory Birds. (Attached)

Holl, K. D., C. E. Zipper and J. A. Burger. 2001. Recovery of native plant communities after mining. Virginia Cooperative Extension Publ. 460-140. [Online version available at <http://www.ext.vt.edu/pubs/mines/460-140/460-140.html>. A copy of this paper was sent to Mr. Forren, January 2004, with the comments prepared by the American Bird Conservancy Policy Council.]

Northeast Working Group of Partners in Flight, Steering Committee. April 2003. Draft Comments for the EIS on Mountaintop Removal Mining/Valley Fills draft EIS. (Attached)

Rosenberg, K. V., S. E. Barker, and R. W. Rohrbaugh. 2000. An atlas of Cerulean Warbler populations: Final report to the U.S. Fish and Wildlife Service. December 2000. [Online version available at <http://birds.cornell.edu/cwaw/cwawpresults.htm>. A copy of this report was sent to Mr. Forren, January 2004, with the comments prepared by the American Bird Conservancy Policy Council.]

Siddell D. 2003. Recent Tennessee Permits. Supervisor, Technical Group, Office of Surface Mining, Knoxville, TN email communication 11/04/03 [A copy of this memo was sent to Mr. Forren, January 2004, with the comments prepared by the American Bird Conservancy Policy Council.]

Tennessee Valley Authority. 2002. Braden Mountain surface mine; Campbell and Scott Counties, Tennessee. Tennessee Valley Authority, Knoxville. [A copy of this paper was sent to Mr. Forren, January 2004, with the comments prepared by the American Bird Conservancy Policy Council.]

U.S. Fish Wildlife Service. 2002. Birds of conservation concern 2002. Division of Migratory Bird Management, Arlington, Virginia. 99pp. [Online version available at <http://migratorybirds.fws.gov/reports/bcc2002.pdf>]. A copy of this paper was sent to Mr. Forren, January 2004, with the comments prepared by the American Bird Conservancy Policy Council.]

U.S. Fish Wildlife Service. 9/20/02. Comments on Draft MTM/VF EIS of Chapter IV (Alternatives). [A copy of this memo was sent to Mr. Forren, January 2004, with the comments prepared by the American Bird Conservancy Policy Council.]

USGS. 2003. The North American Breeding Bird Survey Results and Analysis, 1966–2002. <http://www.mbr-pwrc.usgs.gov/bbs/bbs.html>. Relative abundance maps. [See Figure 1 in comments sent to Mr. Forren, January 2004, by the American Bird Conservancy Policy Council.]

Weakland, C. A. and P. B. Wood. 2002. Cerulean Warbler (*Dendroica cerulea*) microhabitat and landscape-level habitat Characteristics in southern West Virginia in relation to mountaintop mining/valley fills. Final Project Report submitted to USGS Biological Resources Division, Species-At-Risk Program. [Available online at <http://www.forestry.caf.wvu.edu/pWood/>]. A copy of this paper was sent to Mr. Forren, January 2004, with the comments prepared by the American Bird Conservancy Policy Council.]

Executive Order 13186

Presidential Documents

Executive Order 13186 – Responsibilities of Federal Agencies To Protect Migratory Birds

January 10, 2001

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in furtherance of the purposes of the migratory bird conventions, the Migratory Bird Treaty Act (16 U.S.C. 703-711), the Bald and Golden Eagle Protection Acts (16 U.S.C. 668-668d), the Fish and Wildlife Coordination Act (16 U.S.C. 661-666e), the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347), and other pertinent statutes, it is hereby ordered as follows:

Section 1. Policy. Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment-Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs Executive departments and agencies to take certain actions to further implement the Act. Sec. 2. Definitions. For purposes of this Order:

- (a) "Take" means take as defined in 50 C.F.R. 10.12, and includes both "intentional" and "unintentional" take.
- (b) "Intentional take" means take that is the purpose of the activity in question.
- (c) "Unintentional take" means take that results from, but is not the purpose of, the activity in question.
- (d) "Migratory bird" means any bird listed in 50 C.F.R. 10.13.
- (e) "Migratory bird resources" means migratory birds and the habitats upon which they depend.
- (f) "Migratory bird convention" means, collectively, the bilateral conventions (with Great Britain/Canada, Mexico, Japan, and Russia) for the conservation of migratory bird resources.
- (g) "Federal agency" means an Executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.
- (h) "Action" means a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency. Each Federal agency will further define what

the term "action" means with respect to its own authorities and what programs should be included in the agency-specific Memoranda of Understanding required by this Order. Actions delegated to or assumed by nonfederal entities, or carried out by nonfederal entities with Federal assistance, are not subject to this Order. Such actions, however, continue to be subject to the Migratory Bird Treaty Act.

(i) "Species of concern" refers to those species listed in the periodic report "Migratory Nongame Birds of Management Concern in the United States," priority migratory bird species as documented by established plans (such as Bird Conservation Regions in the North American Bird Conservation Initiative or Partners in Flight physiographic areas), and those species listed in 50 C.F.R. 17.11.

Sec. 3. Federal Agency Responsibilities. (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.

(b) In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this Order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory birds.

(c) Each MOU shall establish protocols for implementation of the MOU and for reporting accomplishments. These protocols may be incorporated into existing actions; however, the MOU shall recognize that the agency may not be able to implement some elements of the MOU until such time as the agency has successfully included them in each agency's formal planning processes (such as revision of agency land management plans, land use compatibility guidelines, integrated resource management plans, and fishery management plans), including public participation and NEPA analysis, as appropriate. This Order and the MOUs to be developed by the agencies are intended to be implemented when new actions or renewal of contracts, permits, delegations, or other third party agreements are initiated as well as during the initiation of new, or revisions to, land management plans.

(d) Each MOU shall include an elevation process to resolve any dispute between the signatory agencies regarding a particular practice or activity.

(e) Pursuant to its MOU, each agency shall, to the extent permitted by law and subject to the availability of appropriations and within Administration budgetary limits, and in harmony with agency missions:

(1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the Environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning,

coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and guidance, ensure that agency plans and actions promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Plan, and other planning efforts, as well as guidance from other sources, including the Food and Agricultural Organization's International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries;

(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

(7) provide notice to the Service in advance of conducting an action that is intended to take migratory birds, or annually report to the Service on the number of individuals of each species of migratory birds intentionally taken during the conduct of any agency action, including but not limited to banding or marking, scientific collecting, taxidermy, and depredation control;

(8) minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions. With respect to intentional take, the MOU shall be consistent with the appropriate sections of 50 C.F.R. parts 10, 21, and 22;

(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts;

(10) within the scope of its statutorily-designated authorities, control the import, export, and establishment in the wild of live exotic animals and plants that may be harmful to migratory bird resources;

(11) promote research and information exchange related to the conservation of migratory bird resources, including coordinated inventorying and monitoring and the collection and assessment of information on environmental contaminants and other physical or biological stressors having potential relevance to migratory bird conservation. Where such information is collected in the course of agency actions or supported through Federal financial assistance, reasonable efforts shall be made to share such information with the Service, the Biological Resources Division of the U.S. Geological Survey, and other appropriate repositories of such data (e.g., the Cornell Laboratory of Ornithology);

(12) provide training and information to appropriate employees on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory bird habitat;

(13) promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State, as appropriate or relevant to the agency's authorities;

(14) recognize and promote economic and recreational values of birds, as appropriate; and

(15) develop partnerships with non-Federal entities to further bird conservation.

(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.

(g) Each agency shall advise the public of the availability of its MOU through a notice published in the Federal Register.

Sec. 4. Council for the Conservation of Migratory Birds. (a) The Secretary of Interior shall establish an interagency Council for the Conservation of Migratory Birds (Council) to oversee the implementation of this Order. The Council's duties shall include the following: (1) sharing the latest resource information to assist in the conservation and management of migratory birds; (2) developing an annual report of accomplishments and recommendations related to this Order; (3) fostering partnerships to further the goals of this Order; and (4) selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

(b) The Council shall include representation, at the bureau director/administrator level, from the Departments of the Interior, State, Commerce, Agriculture, Transportation, Energy, Defense, and the Environmental Protection Agency and from such other agencies as appropriate.

Sec. 5. Application and Judicial Review. (a) This Order and the MOU to be developed by the agencies do not require changes to current contracts, permits, or other third party agreements.

(b) This Order is intended only to improve the internal management of the Executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

William J. Clinton  
The White House,  
January 10, 2001.

To submit questions and comments about CEQ NEPA.net,  
please use the NEPA.net Feedback System.

DRAFT  
April, 2003

REC'D JAN 09 2004

Dear Steering Committee for the EIS on Mountaintop Removal Mining/Valley Fills:

Please accept the following comments for consideration in the EIS being developed for mountaintop removal mining/valley fill activities in West Virginia, Kentucky, Tennessee, and Virginia. These comments on the impacts of mountaintop mining activities on the full suite of priority birds associate with mature deciduous forests, including populations of Cerulean Warblers, are supported by Steering Committee members of the Northeast Working Group of Partners in Flight (PIF). A brief summary statement is presented below, with a more detailed discussion in the attached pages. These comments represent a synthesis of information gained from published literature, bird conservation plans developed by PIF, an extensive Cerulean Warbler Atlas Project conducted from 1997-2000, and discussions with colleagues. Preliminary figures from the EIS on cumulative impacts of this mining activity in the study area suggest a massive and permanent impact within the EIS study area on the entire suite of priority mature forest birds (e.g., Cerulean Warbler, Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Wood Thrush, Yellow-throated Vireo, Acadian Flycatcher) due to the estimated forest loss of approximately 760,000 acres from issued and future permits during the 20-year period of 1992 to 2012. Total cumulative forest loss from all mining activities, including permitted activities prior to 1992, is estimated at 11.5% of the total forest cover in the EIS study area. We consider this level of habitat loss to constitute a significant negative impact for the entire mature forest suite of birds, and especially for the Cerulean Warbler, the forest species of highest concern in this area. The cumulative impacts from issued and proposed future mountaintop mine/valley fill permits during this period appear likely to eliminate breeding habitat for 10%-20% (our estimate is 17%) of the global population of Cerulean Warblers. This level of habitat loss is unacceptable for a species that has experienced steep population declines over the last 30 years and is facing other major threats. Furthermore, research within the EIS study area shows that densities of Cerulean Warblers are reduced in isolated forest patches left by mining and near mine edges, indicating an even greater impact beyond the direct habitat loss from mining activities. According to PIF bird conservation plans, grassland birds are not a high conservation priority within the EIS study area, and the creation of artificial habitats that may be suitable for shrub nesting species does not justify removing and fragmenting extensive mature forest areas and replacing them with poor quality, early-successional habitats. We encourage every effort to minimize the removal and fragmentation of existing mature forest habitat in the EIS study area.

Sincerely,

Steering Committee  
Northeast Working Group of Partners in Flight

*Impacts of Mining Activities on Mature Forest Birds.* The mountaintop removal mining/valley filling practices addressed by the EIS occur throughout what can be considered the core of the breeding range for many of the PIF high priority birds of eastern mature deciduous forests, including Cerulean Warbler, Louisiana Waterthrush, Worm-eating Warbler, Wood Thrush, Yellow-throated Vireo, and Acadian Flycatcher. According to Breeding Bird Survey (BBS) data, all of the species just mentioned occur at or near their peak abundances within the EIS study area, which largely overlaps with the Northern Cumberland Plateau physiographic area as delineated by PIF. Numerous other species of this habitat suite also occur in high relative abundances within this area, including Kentucky Warbler, Eastern Wood-Pewee, Ovenbird, and Scarlet Tanager. The mining and valley fill activities addressed by the EIS directly affect several of the primary habitats used by these species – mature deciduous forest on Appalachian ridge tops (used by Cerulean Warbler, Yellow-throated Warbler, Eastern Wood-Pewee, Scarlet Tanager, Ovenbird, Wood Thrush), and mature mixed-mesophytic forest along headwater streams (“coves” – used by Cerulean Warblers, Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Acadian Flycatcher, Wood Thrush). Preliminary figures from the EIS on cumulative impacts of mining activities in the study area suggest a massive and permanent impact on the mature forest suite of birds within the study area due to the estimated forest loss of approximately 760,000 acres from issued and future permits during the 20-year period of 1992 to 2012. An additional 648,000 forested acres appears to have been lost from permitted mining activities prior to 1992.

The total cumulative forest loss from mining activities equates to an 11.5% reduction in total forest cover in the study area. Removing >10% of the forest cover from a region is likely to have negative impacts on mature forest birds, even in well-forested landscapes. As overall forest cover drops in a region, negative impacts to forest breeding birds from fragmentation and edge effects will become more severe. Work by O’Connell et al. (2000) across the Mid-Atlantic Highlands region, which includes a large part of the EIS study area, suggests that as landscapes fall below a threshold of about 82% forest cover, the ecological integrity of the forest community becomes increasingly compromised. Removing almost 12% of the forest from the EIS study area through mining activities alone will bring the % forest cover of this entire area down close to this threshold and certainly will cause some landscape-level areas within this larger area to fall well below this threshold. We consider the level of breeding habitat loss resulting from permitted and proposed mining activities to represent a significant negative impact for the suite of mature deciduous forest birds in the EIS study area, particularly for those species for which this area represents the core of their breeding range.

*Specific Impacts to Cerulean Warblers.* Because the Cerulean Warbler is the mature forest species of highest concern according to PIF assessments and because it has been petitioned for listing under the Endangered Species Act, we provide a more detailed analysis on the impacts that mining activities are likely to have on this species.

*Population status and trends.* The general status and population trends of Cerulean Warbler in most parts of its range are fairly well documented. These have been previously summarized in the USFWS Status Assessment (Hamel 2000), as well as final report to USFWS of the Cerulean Warbler Atlas Project (Rosenberg et al., 2000). We believe that population trends as reported by the BBS are sufficiently reliable for Cerulean Warbler at range-wide and regional scales. These

trends show a roughly 4.5%-per-year decline range-wide since 1966, with steep declines in nearly every region including in the core of the species’ range, which overlaps almost entirely with the EIS study area.

As part of the development of a PIF North American Landbird Conservation Plan, estimates of the total continental breeding populations of most species have been developed for the purpose of setting conservation objectives. Using this method of extrapolating BBS relative abundances, the current total population estimate (using data from the decade of the 1990s) for Cerulean Warblers is about 560,000 birds, or roughly 280,000 pairs. Based on the BBS data, an estimated 70% of the total breeding population occurs in the Ohio Hills and Cumberland Plateau physiographic areas from southern Ohio and Pennsylvania, through West Virginia to Tennessee. Vast areas of suitable habitat in this region support large populations of Cerulean Warblers, especially on privately owned forestlands. We should note that although 280,000 pairs seem like a sizable population, it is among the smallest populations of any passerine bird in North America, which mostly number in the millions.

*Threats to populations.* We consider the major threats to Cerulean Warblers to fall within four main categories: (1) direct loss of breeding habitat from mining activities; (2) loss of breeding and migration stop-over habitat due to development; (3) loss of suitable breeding habitat from silvicultural practices; and (4) habitat loss on wintering grounds in South America. We consider the practice of mountaintop removal mining/valley filling to be the greatest immediate threat within the core of the Cerulean Warbler’s breeding range.

Applying similar methods to those used in calculating total population sizes for the PIF North American Landbird Conservation Plan, BBS survey data indicate that the average breeding density of Cerulean Warblers across the Northern Cumberland Plateau physiographic area during the 1990s was 0.065 pairs/acre. Most of the EIS study area occurs in this physiographic area. This estimate does not include a time-of-day correction used in calculating the total population size, and therefore might be an underestimate. However, this density is similar to breeding densities estimated from territory mapping plots surveyed in southern West Virginia, although locally higher densities were observed in some locations. Using this BBS-derived estimate of breeding densities and applying it to the estimated forest loss of approximately 760,000 acres from issued and future mining permits between 1992 and 2012, habitat for approximately 49,400 pairs (17% of the estimated total Cerulean Warbler population) would be eliminated through mining activities during this period. This is a very rough estimate of the number of birds likely to be impacted and is based on the assumption that the entire area within permit boundaries would be disturbed. Nonetheless, we are confident in stating that breeding habitat for as much as 10%-20% of the known Cerulean Warbler population is likely to be directly eliminated by proposed and permitted mountaintop mines/valley fills during the 20-year period of 1992-2012. These numbers reflect direct loss of breeding habitat and do not reflect reductions in habitat suitability around mine sites. Research within the EIS study area has shown that densities of Cerulean Warblers are reduced in forest patches remaining from mining activities and in forest near mine edges. We consider the level of breeding habitat loss due to mining activities in the EIS study area to represent a significant negative impact for this species of high continental concern that is already experiencing steep population declines and is threatened by other major impacts such as development and loss of wintering ground habitat.

Northeast Partners in Flight comments for mountaintop mining EIS 4

*Relative Conservation Value of Reclaimed Mines vs. Undisturbed Forest Habitat.* We do not consider removal of extensive areas of mature forest and replacement with the poor quality, early-successional habitats resulting from current reclamation practices to be an appropriate action for bird conservation in the EIS study area. First, this habitat alteration is occurring in core breeding areas for many high priority birds of the mature eastern deciduous forest suite. Removing almost 12% of the forest cover from this area is likely to negatively impact all of these species. In particular, this area is critical for the long-term persistence of the Cerulean Warbler and the estimated forest loss from mining activities will represent a significant negative impact for this species of high continental concern. Second, current reclamation practices result in large acreages of grassland habitat, but the grassland suite of birds is a relatively low PIF conservation priority in the EIS study area. The vast majority of grassland bird species benefiting from the current mining activities are rather low in conservation priority, and this area is not a core breeding area for grassland birds. Third, current methods of reclamation following mountaintop removal mining/valley fill activities result in poor quality, early-successional habitats of grasses and shrubs that are likely to remain in these early-successional conditions for very long periods of time due to the soil disruption and compaction during the mining and reclamation process. Estimates of the length of time it will take tree species to colonize and reforest these areas are in the many hundreds of years (e.g., 500-1000 years). The minimal value that habitats reclaimed under current methods might have for early-successional bird species does not justify replacing mature forests with extremely long-lasting, poor-quality, early-successional habitats. Maintaining extensive tracts of mature deciduous forests to support the high diversity of mature forest birds, many of which are high conservation concern species, is one of the highest PIF conservation priorities within the EIS study area. We encourage every effort to minimize the removal and fragmentation of existing mature forest habitat within the EIS study area.

REC'D DEC 31 2003



GLENDALÉ - LA CRÉSCÉNTA ADVOCATES

1924 EL Caminito St.  
La Crescenta, CA 91214  
(515) 248-1793



December 27, 2003

Mr. John Forren  
U.S. EPA (3EA30)  
1650 Arch Street  
Philadelphia, PA 19103

Dear Mr. Forren:

It is to be hoped that you will see to it that the present EIR relative to mountaintop mining will adequately address the environmental issues surrounding that type of mining.

We, as a nation, have already lost hundreds of miles of streams, those streams being filled with rubble from unnecessary mountaintop mining. Mr. Forren, water is already in short supply here and around the world. We need to address this very serious problem and burying streams, thereby decreasing the supply of potable water, is certainly not the way to start.

You can begin by seeking to impress upon your boss, Mr. Bush and others in his corner, the need to emphasize the use of renewable energy sources and eliminate the use of coal completely. There is no reason whatsoever, in this day and age, for us to burn coal when energy sources such as hydrogen, natural gas, wind power, solar energy, geothermal power, etc. are available waiting only on emphasis, proper funding and, in the case of hydrogen, some further technological work.

Without water, every living thing dies! Let's protect our children and grandchildren by making sure that this EIR eliminates mountaintop mining and coal mining in general. That way we increase the supply of water while reducing the air pollution created by the burning of coal as well as keeping our mountaintops green, ecologically balanced, and pleasing to the eye.

Thank you,  
  
Sincerely,  
Richard Seeley



December 31, 2003

U.S. EPA (3EA30)  
1650 Arch St.  
Philadelphia, PA 19103

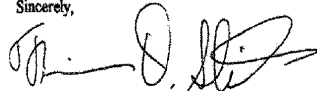
Dear Mr. Forren:

As conservation chair of the West Virginia Chapter of the Sierra Club, I am submitting the following comments for the more than 1660 members of our chapter. Please consider these comments as part of the official record on the Draft Environmental Impact Statement (DEIS) on Mountaintop Removal (MTR) Mining.

MTR and valley fills are destroying the environment and culture of the southern coalfields in my home state of West Virginia. Your DEIS states that MTR has already buried 724 miles of streams in the coalfields of WV, KY, and VA. These biologically diverse streams are important in the prevention of flooding in this mountainous area. These streams channel water and allow access rain and snowmelt to be absorbed by the aquifer. MTR also destroys hundreds of thousands of acres of the most biologically diverse forest in the world. These forests prevent flooding by absorbing rain and snowmelt. I personally know many residents of the WV coalfields whose quality of life is degraded by MTR. This destructive practice is negatively affecting many people that live in these mountain communities.

I do not support Alternative 1, 2, or 3 as described in the DEIS. None of these options will protect Appalachian forests, water, or communities. In particular, I oppose the proposal to eliminate the stream buffer zone rule that prohibits mining activity within 100 feet of streams. This rule should be strictly enforced. Leveling mountains and burying streams is wrong and must stop.

Sincerely,



Mr. Francis D. Slider  
Conservation Chair  
West Virginia Chapter of the Sierra Club  
Rt 1 Box 163-A2  
Middlebourne, WV 26149  
304-758-2500

REC'D JAN 05 2004

----- Forwarded by John Forren/R3/USEPA/US on 12/26/03 08:55 AM -----

SShteir@aol.com

To: John

Forren/R3/USEPA/US@EPA

12/24/03 08:53 PM

CC: Subject: Public Comment

On Mountaintop Removal-Seth

Shteir, SPVAS

December 24, 2003

Dear Mr. Forren,

I hope that this e-mail finds you in good health and that you found a relaxing way to spend the holidays.

I am Vice President of the 2000 member San Fernando Valley Audubon Society. I'm writing you to urge you to withdraw the current EIS for mountaintop removal and to issue a new draft that includes alternatives to this mining practice that will minimize impact to critical habitat for wildlife.

The current EIS is incomplete in several aspects. First, it fails to assess the impacts on migratory birds such as the Cerulean Warbler. Second, it does not address the fact that 1200 miles of streams and hundreds of square miles of forested mountains have been virtually flattened by this extremely destructive mining practice. Finally, it does not include any safeguards for local communities that depend on the region's natural resources.

I am proud to be an environmentalist who recognizes the importance of the local economies affected by land management decisions. However, mountaintop removal practices are nonsensical and are completely dictated by securing the cheapest extraction price for industry. I am convinced that there are ways industry can thrive while protecting America's natural heritage. I urge you to take measures to curtail this practice while respecting local economies, protecting wildlife and communities.

Sincerely,

Seth D. Shteir  
Vice President  
San Fernando Valley Audubon Society  
14355 Huston St., #225  
Sherman Oaks, CA 91423  
818-995-6429

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**Comments Regarding The Draft Programmatic Environmental Impact  
Statement  
July 24, 2004**

**John R. Snider  
Vice President, External Affairs, Eastern Operations  
Arch Coal, Inc.**

**On Behalf Of The  
West Virginia Coal Association**

Good evening, my name is John R. Snider. For the past two years I have been employed as Vice President of External Affairs, Eastern Operations, Arch Coal. Prior to that I had worked for four years in the West Virginia Development Office, with last two serving as Executive Director. I have over 25 years experience in the field of economic development in West Virginia as well as experience in the Northern and Central Appalachian coal fields. During my time with the Development Office, I assisted with developing the rules for the West Virginia Coal Field Development Office as well as assisting in the development of funding for several post mine land use developments. I am a Certified Economic Developer. Today, I am speaking on behalf of the West Virginia Coal Association.

I would like to discuss several issues relating to the socio-economic portion of the Draft Programmatic Environmental Impact Statement.

The Gannett Fleming's document "Final Case Studies Report on Demographic Changes Related to Mountaintop Mining Operations" offers some interesting conclusions which relate to many economies which may be found in transition. West Virginia, as a whole, like many other areas of the country has been progressing thru a transitional period in that types of employment are shifting from heavy manufacturing and mining to a service based economy. Similar conclusions that Gannett Fleming makes, could be reached in many areas of the United States over the past twenty years when Census Tracts or small communities are considered individually. Long gone are the days that most miners work in the same town or census tract as the mine they are employed. Stop and think, do I live in the same census tract that I work or even the same town. In addition, the improvement of transportation systems in southern West Virginia allows miners to live wherever they want and travel to the mine. This study only includes the economic impacts in the adjacent area, whereas today's modern mine has a much greater affect geographically than in the past.

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Several other issues also must be looked at in different light when you view what was happening during the time frame outlined by the study.

1. The population of West Virginia is declining. It is no surprise that the six communities are also declining.
2. The United States population has been for several years changing from an industrial based economy to a service oriented economy. During the time of this work, we saw many of our high paying industrial jobs go off shore. We have seen and continue to see a coal production shift from Central Appalachia to the Powder River Basin in Wyoming. As we discuss this issue today, we are seeing more of our market share being provided outside of the United States.
3. As our country changes from industrial to service, we are seeing many of our fine employees being left behind. West Virginia has traditionally been a heavy industry state which included at its heart the production of glass, steel, chemicals, timbering and mining. West Virginia has been impacted negatively more than other areas which have a more diversified economy. Many of our industries and mines have closed.
4. The average age of a West Virginian has increased over the past several years much quicker than the rest of the country. West

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Virginia average population is currently the oldest in the country. In addition, state wide we are losing school age population. Very few areas in West Virginia are gaining population and the 14 county area is no different..

Overall, Gannett Fleming did a fair job describing what was transpiring in the six small communities. If they would have looked at West Virginia, as a whole, or even some other areas of the United States which are in transition, they would have found the same trends. In fact, this study could have been transferable to many areas in transition during the same period. But in today's society you can not draw a valid economic or social conclusion on such a small area as 100 home community or a census tract. Global conditions have an affect on all economies and must be taken into account.

One of the ways to change many of the problems discussed in Gannett Fleming's study would be to develop usable sites for development and growth of the area. We must have rules that allow us to develop post mine land use sites to provide diversification in southern West Virginia to help create stability and growth.

We believe that a modified Alternative III offers that capability.

Thank you for taking time to listen to my presentation.

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John R. Snider  
Arch Coal, Inc.  
10 Kenton Drive  
Charleston, West Virginia 25311

"Spahr MD, John"  
<Jspahr@AugustaMe  
To: R3 Mountaintop@EPA  
d.com> cc:  
Subject: Please stop this habitat destruction.  
12/22/2003 11:54  
AM

December 30, 2003

John Porren  
U.S. EPA (3EA30), 1650 Arch Street  
Philadelphia, PA 19103  
mountaintop.r3@epa.gov

Dear Mr. Porren,

We write on behalf of the undersigned groups, representing millions of Americans, concerning the Draft Programmatic Environmental Impact Statement on Mountain Top Mining/Valley Fill (MTM/VF) in the Appalachian region of the eastern United States. We are extremely troubled over the harmful impacts that mountaintop/valley fill mining has had and could continue to have on a wide array of aquatic and terrestrial organisms. In addition to the direct effects of habitat loss and degradation at mine sites and areas immediately adjacent, the drastic alteration of large landforms over such an extensive region could very well have negative and long-lasting effects on ecosystem processes at considerable distances from the areas more directly disturbed. These concerns are not adequately addressed in the draft EIS. However, despite our serious concerns regarding the potential for disrupting ecological processes and biodiversity in general, these comments are specifically directed to issues regarding migratory birds. The impacts to forest-associated bird species of conservation concern also are not adequately or properly addressed in this draft EIS.

I. The DEIS Ignores the High Priority Assigned through Congress by wildlife Agencies to the Conservation of Mature Forest Bird Species.

The figures from the draft EIS on cumulative impacts of mining activity in

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the study area suggest a massive and permanent impact on the entire suite of Partners in Flight priority mature forest birds within the EIS study area (e.g., Cerulean Warbler, Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Wood Thrush, Yellow-throated Vireo, Acadian Flycatcher) due to a projected loss of over 390,000 acres (149,822 hectares) of high-quality forest to mining in the next ten years. This is in addition to that same amount having been lost in the previous ten years. All of these bird species are also classified as Birds of Conservation Concern by the U.S. Fish and Wildlife Service (USFWS 2002) within the Appalachian Bird Conservation Region, which overlaps the area considered in the draft EIS. This list is mandated by Congress under 1988 amendments to the Fish and Wildlife Conservation Act and denotes species that without additional conservation actions are likely to become candidates for listing under the Endangered Species Act. We consider this level of habitat loss to constitute a significant negative impact for these high priority mature forest birds, and especially for the Cerulean Warbler, the forest species of highest concern in this area. We are struck by the failure of the draft EIS to address this extremely important and significant environmental impact.

While we don't have reliable estimates of the densities of most of these priority species in the region, we do have them for Cerulean Warblers. This is the forest-breeding bird species we are most concerned with because it has suffered drastic population declines over the last several decades and the core of its breeding range coincides very closely with the EIS study area (Figure 1). This species has been petitioned for listing under the Endangered Species Act and is also on the USFWS' National List of Birds of Conservation Concern (USFWS 2002).

II. The DEIS Ignores Available Scientific Data Showing Higher Bird Densities and Higher Potential Losses from Mining Impacts.

Recent research by Drs. Weakland and Wood (2002) at West Virginia University found the average density of Cerulean Warblers territories in intact forest near mined areas in West Virginia was 0.46 pairs/hectare (ha). Assuming each territory provides habitat for a pair of birds, this equates to 0.92

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individuals/ha. With the projected loss of over 149,822 ha to future mining in the next ten years, this will result in a loss of 137,836 Cerulean Warblers in the next decade. Dr. Charles Nicholson (TVA 2002) reported a somewhat higher average density of 0.64 pairs of Cerulean Warblers per ha at his study sites within the draft EIS study area in eastern Tennessee. If his density estimate is more representative of the density over the study area, then even more ceruleans would have been impacted in the last decade and the same number would be impacted in the next. Either estimate represents an unacceptable loss.

Partners in Flight (PIF), a science-based initiative dedicated to the conservation of landbirds in the western hemisphere, estimates the global population of Cerulean Warblers, based on relative abundance estimates derived from 1990s Breeding Bird Survey data, to be roughly 560,000 individuals with 80% of the population breeding in the Appalachian region which encompasses the study area (Rich et al. 2004). Applying similar methods, BBS survey data indicate that the average breeding density of Cerulean Warblers across the Northern Cumberland Plateau physiographic area during the 1990s was 0.065 pairs/acre (Rich et al. 2004, Appendix B, Rosenberg and Blancher in press). These numbers indicate that roughly 9% of the world's ceruleans were lost as a result of mining permitted during the 1992 to 2002 period and another 9% will be lost between 2003 and 2012 should the level of mining the draft EIS projects in the next decade come to fruition. In addition, we fear that in a region where Cerulean Warblers presently occur in such high densities, the breeding habitat could already be saturated and the individuals displaced by mines wouldn't be able to find new areas of high-quality breeding habitat to colonize. If this is the case, the reproductive potential of those pairs also will be compromised and the ability of the population to recover will be reduced as a result. It is important to note that these estimates of Cerulean Warbler population loss substantially underestimate the actual impact of mountaintop mining on this species. By definition, mountaintop mining removes forest habitat on

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mountain and ridge tops. Cerulean Warblers prefer ridgetops within large blocks of mature forest (Weakland and Wood 2002). In addition, Drs. Weakland and Wood (2002) found significantly reduced densities of breeding Cerulean Warblers in forest fragmented by mining and in forest adjacent to mine edges. We find it disturbing and unacceptable that Dr. Weakland and Dr. Wood's research was not included in the draft EIS document when we know that it was made available to those who were involved in its development.

### III. The DEIS Fails to Address Technology Changes that will Alter Projections of Future Forest Loss

We believe that the draft EIS projection that an additional 3.4% of forest will be lost between 2002 and 2012 may significantly underestimate the impact of mining on hardwood forests. Not only do these figures fail to include an estimate of the cumulative loss of cove forests from valley fill operations, they also do not take into consideration the anticipated increase in future demand for Appalachian coal due to the planned construction of flue gas desulfurization units (scrubbers) at existing coal-fired generating plants in the study area (TVA 2002). For example, the draft EIS projects that Tennessee will issue permits causing the loss of 9,154 acres of forest in 2003 through 2012, when over 5,000 acres of surface mining permits have already been approved between December 2002 and October 2003 (Siddell 2003).

### IV. The DEIS Fails to Identify and Analyze Effective Mitigation Measures to Reduce Bird Losses

The only mitigation offered in the draft EIS for the destruction of large areas of biologically diverse hardwood forest habitat by mining operations is a suggestion that the denuded areas could be reforested after operations cease. While recent research indicates that some forest communities may be reestablished on reclaimed mine sites (Holl et al. 2001), the draft EIS concedes that initiatives to improve the establishment of forests on reclaimed mine sites have only recently begun and "that it would be premature to attempt to evaluate the success of these efforts at this time". In addition, the draft EIS states that "as post-mined sites will likely lack the requirements of slope, aspect and soil moisture needed for cove-hardwood forest communities, it is unlikely that these particular communities can

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be re-established through reclamation". It will take many decades before these experimental forests mature sufficiently to assess whether they will provide suitable breeding habitat for Cerulean Warblers or any other interior forest-breeding birds of concern. Even if reforestation was determined to be the preferred mitigation for Cerulean Warbler habitat loss, the development of reforestation BMPs (Action 13) would be voluntary and a state or federal legislative change (Action 14) could take years. The suggestion that reforestation is a panacea to mitigate the negative effects of mining on interior forest habitat within the foreseeable future is therefore wrong and misleading. Furthermore, we find it extremely inappropriate that the draft EIS suggests that a mining company could be offered an economic incentive, through the sale of carbon credits, for planting trees to replace the forest that they themselves destroyed during mining activities.

We also find it inappropriate to consider replacing forest habitat with grassland habitat for "rare" eastern grassland species even though these species have declined dramatically as a group in recent decades. Their recovery and habitat restoration efforts should be targeted towards ecosystems and landscapes where they occurred historically, not on eastern mountaintops, where grassland habitat was rare, and currently supports high quality forest habitats.

### V. The DEIS Fails to Identify and Analyze Reasonable Alternatives to Avoid Bird Losses

We find the draft EIS' failure to provide an alternative proposal that would provide better regulation of mountain top mining to protect the environment unacceptable and inappropriate. We believe that taken together, these two major flaws are fatal and require the re-issuance of the draft EIS. These fatal flaws mean the draft EIS fails to comply with NEPA. The draft EIS needs to be cured by an EIS that appropriately addresses both the concerns over priority bird species mentioned herein and that offers a solid environmentally sound alternative.

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The U.S. Fish and Wildlife Service's September 2002 (USFWS 9/20/02) memo clearly supports our conclusion that the draft EIS is fatally flawed. The FWS warned in the memo that publication of the draft EIS as written, "will further damage the credibility of the agencies involved." That inter-agency memo cites the proposed actions offering "only meager environmental benefits" and criticizes the draft EIS because it did not consider any options that would actually limit the area mined and the streams buried by valley fills. "There is no difference between [the alternatives]," the Fish and Wildlife officials said. "The reader is left wondering what genuine actions, if any, the agencies are actually proposing." The draft EIS erroneously only offers alternatives that would streamline the permitting process for approval of new mountaintop-removal permits. The alternatives, including the preferred alternative, offer no environmental protections and the lack of any such environmentally sound options destroys the NEPA EIS process.

The FWS memo argued for "at least one alternative to restrict, or otherwise constrain, most valley fills to ephemeral stream reaches...As we have stated repeatedly, it is the service's position that the three 'action' alternatives, as currently written, cannot be interpreted as ensuring any improved environmental protection ... let alone protection that can be quantified or even estimated in advance."

VI. Because the DEIS Is Fatally Defective, It Should Be Revised and Reissued for Public Comment and Permit Issuance Should Cease.

We do not find that the three "action" alternatives offered would improve environmental protection in any measurable way. We propose that a moratorium be placed on new mountaintop mining permits until a new draft EIS is written to provide for the avoidance of key Cerulean Warbler habitat and significant environmental protection for the Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Wood Thrush, Yellow-throated Vireo, Acadian Flycatcher and other PIF priority species and FWS Birds of Conservation Concern. This moratorium should continue until a final EIS is adopted with an environmentally acceptable alternative.

We believe that NEPA requires such a moratorium as the environmental

impacts are so great and the federal government has failed to complete an EIS as required, even after 5 years have passed since litigation was initially filed on this issue. Settlement of the litigation was to result in an EIS and better measures to protect the environment. The draft EIS clearly indicates that this is not occurring. Also, the Clean Water Act dictates individual permits should be required for such major actions and thus, the current use of nationwide permits is illegal.

We conclude that mining is a short-term benefit to local economies and once the coal is extracted, the industry will leave the region. However, if the scenic vistas and natural heritage of the area are preserved, an economy buoyed by recreation and tourism would provide added value for generations to come.

We appreciate the opportunity to comment on this Draft Environmental Impact Statement.

Respectfully Submitted,  
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Figure 1. Cerulean Warbler (*Dendroica cerulea*) Summer Distribution Map. The North American Breeding Bird Survey Results and Analysis, Relative Abundance Map 1966 - 2002. USGS 2003.

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These maps indicate the number of birds seen on BBS routes, grouped into convenient categories of relative abundance. The maps predict the average number of birds of the species that could be seen in about 2.5 hours of birdwatching along roadsides (by very good birders). They are based on mean counts on BBS routes over the interval 1982 - 1996.